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# IDAHO CODE

CONTAINING THE

## GENERAL LAWS OF IDAHO ANNOTATED

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LAWS 1947, CHAPTER 224

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Compiled Under the Supervision of the  
Idaho Code Commission

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EXECUTIVE SECRETARY

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**TITLES 14-17**

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## PUBLISHER'S NOTE

Since the publication in 2001 of former Replacement Titles 14 to 17, many laws have been amended or repealed and many new laws have been enacted. The resulting increase in the size of the cumulative supplement for the former volume has made it necessary to revise this volume. Accordingly, Replacement Titles 14 to 17 are issued with the approval and under the direction of the Idaho Code Commission.

This publication contains annotations taken from decisions of the Idaho Supreme Court and the Court of Appeals, and the appropriate federal courts, posted on *lexis.com* as of April 12, 2009. These cases will be printed in the following reports:

### Idaho Reports

Pacific Reporter, 3rd Series

Federal Supplement, 2nd Series

Federal Reporter, 3rd Series

United States Supreme Court Reports, Lawyers' Edition, 2nd Series

Following is an explanation of the abbreviations of the Court Rules used throughout the Idaho Code.

I.R.C.P.	Idaho Rules of Civil Procedure
I.R.E.	Idaho Rules of Evidence
I.C.R.	Idaho Criminal Rules
M.C.R.	Misdemeanor Criminal Rules
I.I.R.	Idaho Infraction Rules
I.J.R.	Idaho Juvenile Rules
I.C.A.R.	Idaho Court Administrative Rules
I.A.R.	Idaho Appellate Rules

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## USER'S GUIDE

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To assist the legal profession and the layperson in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of this set.





# ADJOURNMENT DATES OF SESSIONS OF LEGISLATURE

Article 3, § 22 of the Idaho State Constitution provides: "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

Section 67-510 Idaho Code provides: "No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law."

Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

This table is given in order that the effective date of acts, not carrying an emergency or which do not specify an effective date, may be determined with a minimum of delay.

Year	Adjournment Date
1921 .....	March 5, 1921
1923 .....	March 9, 1923
1925 .....	March 5, 1925
1927 .....	March 3, 1927
1929 .....	March 7, 1929
1931 .....	March 5, 1931
1931 (E.S.) .....	March 13, 1931
1933 .....	March 1, 1933
1933 (E.S.) .....	June 22, 1933
1935 .....	March 8, 1935
1935 (1st E.S.) .....	March 20, 1935
1935 (2nd E.S.) .....	July 10, 1935
1935 (3rd E.S.) .....	July 31, 1936
1937 .....	March 6, 1937
1937 (E.S.) .....	November 30, 1938
1939 .....	March 2, 1939
1941 .....	March 8, 1941
1943 .....	February 28, 1943
1944 (1st E.S.) .....	March 1, 1944
1944 (2nd E.S.) .....	March 4, 1944
1945 .....	March 9, 1945
1946 (1st E.S.) .....	March 7, 1946
1947 .....	March 7, 1947
1949 .....	March 4, 1949
1950 (E.S.) .....	February 25, 1950
1951 .....	March 12, 1951
1952 (E.S.) .....	January 16, 1952

1953	March 6, 1953
1955	March 5, 1955
1957	March 16, 1957
1959	March 9, 1959
1961	March 2, 1961
1961 (1st E.S.)	August 4, 1961
1963	March 19, 1963
1964 (E.S.)	August 1, 1964
1965	March 18, 1965
1965 (1st E.S.)	March 25, 1965
1966 (2nd E.S.)	March 5, 1966
1966 (3rd E.S.)	March 17, 1966
1967	March 31, 1967
1967 (1st E.S.)	June 23, 1967
1968 (2nd E.S.)	February 9, 1968
1969	March 27, 1969
1970	March 7, 1970
1971	March 19, 1971
1971 (E.S.)	April 8, 1971
1972	March 25, 1972
1973	March 13, 1973
1974	March 30, 1974
1975	March 22, 1975
1976	March 19, 1976
1977	March 21, 1977
1978	March 18, 1978
1979	March 26, 1979
1980	March 31, 1980
1981	March 27, 1981
1981 (E.S.)	July 21, 1981
1982	March 24, 1982
1983	April 14, 1983
1983 (E.S.)	May 11, 1983
1984	March 31, 1984
1985	March 13, 1985
1986	March 28, 1986
1987	April 1, 1987
1988	March 31, 1988
1989	March 29, 1989
1990	March 30, 1990
1991	March 30, 1991
1992	April 3, 1992
1992 (E.S.)	July 28, 1992
1993	March 27, 1993
1994	April 1, 1994
1995	March 17, 1995
1996	March 15, 1996
1997	March 19, 1997

1998 .....	March 23, 1998
1999 .....	March 19, 1999
2000 .....	April 5, 2000
2001 .....	March 30, 2001
2002 .....	March 15, 2002
2003 .....	May 3, 2003
2004 .....	March 20, 2004
2005 .....	April 6, 2005
2006 .....	April 11, 2006
2006 (E.S) .....	August 25, 2006
2007 .....	March 30, 2007
2008 .....	April 2, 2008
2009 .....	May 8, 2009



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# TITLE 14

## ESTATES OF DECEDENTS

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## CHAPTER 1

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**14-101. County treasurer as public administrator — Oath and bond — New or additional bond.** — The county treasurers of the various counties of this state are hereby declared to be ex officio public administrators in their respective counties. Each public administrator shall, before he enters upon the duties of his office, take and file his official oath and execute and file an official bond, conditioned as the bonds of other county officers are, with two good and sufficient sureties, in a sum not less than \$2,000: provided, that the probate court may, upon reasonable cause therefor shown, require at any time a new official bond, or an additional bond, to be given upon ten (10) days' notice in writing. [1881, p. 292, § 1; R.S., R.C., & C.L., § 5680; C.S., § 7775; I.C.A., § 15-1601; am. and redesisg. 1971, ch. 111, § 6, p. 233.]

### STATUTORY NOTES

**Cross References.** — Bond liable for penalties, § 31-2010.

County commissioners to supervise, § 31-802.

County treasurer bonds, amount, § 31-2015.

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Procurement of letters of administration, § 14-103.

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**Prior Laws.** — Former sections 14-101 — 14-118, which comprised Prob. Prac. 1864, §§ 315-325; 1907, p. 338, § 1; R.S., R.C., & C.L., §§ 5700-5717; 1911, ch. 13, § 1; C.S., §§ 7791-7807; 1923, ch. 118, § 1; 1925, ch. 218, §§ 5, 6; 1927, ch. 72, § 1; 1927, ch. 165,

§ 1; 1929, ch. 257, § 3; I.C.A., §§ 14-101 — 14-118, were repealed by S.L. 1971, ch. 111, § 3. For present law pertaining to succession see § 15-2-101 et seq.

**Compiler's Notes.** — The probate court has been abolished. Section 1-103 of the Idaho Code provides that wherever the words "probate court" are used they shall mean the district court or the magistrate's division of the district court.

Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

## JUDICIAL DECISIONS

### ANALYSIS

Accounting for fees.

Ownership of interest on funds.

### Accounting for Fees.

By virtue of holding office of county treasurer, individual becomes ex officio public administrator, and any and all fees and compensation received by him must be accounted for to county. In re Rice, 12 Idaho 305, 85 P. 1109 (1906).

### Ownership of Interest on Funds.

Interest paid on an estate's funds standing to the credit of the public administrator, as county treasurer, belongs to the owner of the funds. Kiernan v. Cleland, 47 Idaho 200, 273 P. 938 (1929).

## RESEARCH REFERENCES

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-102. Estates to be administered.** — (1) Every public administrator must make an initial determination of the absence of an heir or will, and take charge of the estates of persons who, upon their death, reside within his county, as follows:

- (a) Of the estates of decedents for which no personal representatives are appointed, and which, in consequence thereof, are being wasted, uncared for or lost and of estates which he is directed to administer by virtue of the provisions of subsection (a)(7) of section 15-3-203 of this code;
- (b) Of the estates of decedents who have no known heirs;
- (c) Of estates ordered into his hands by the court, and of estates to which the state of Idaho is an heir.

(2) The public administrator must, until a personal representative is appointed, take charge of the property, located in the state of Idaho, of persons dying within his county who resided outside the state at the time of death. [R.S., R.C., & C.L., § 5681; C.S., § 7776; I.C.A., § 15-1602; am. and redesign. 1971, ch. 111, §§ 6, 13, p. 233; am. 1996, ch. 69, § 1, p. 213.]

## STATUTORY NOTES

**Cross References.** — Effect of discovery of heir, § 14-119.

"Estate" defined for uniform probate code, § 15-1-201.

"Heirs" defined for uniform probate code, § 15-1-201.

Intestate decedents without known heirs, § 14-117.

Intestate succession, § 15-2-101 et seq.

Personal representatives, § 15-3-601 et seq.

Supervised administration, § 15-3-501 et seq.

Wills, § 15-2-501 et seq.

**Prior Laws.** — Former § 14-102 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

## JUDICIAL DECISIONS

### ANALYSIS

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Construction.

Prior right.

Resident of one county dying in another.

### Action Mandatory.

It is the duty of a public administrator, in a proper case, to act and, in default thereof, he may be compelled to do so, since he should not be permitted to administer on the choice or lucrative estates and reject the others. In re Rice, 12 Idaho 305, 85 P. 1109 (1906).

### Construction.

The public administrator of the county where one dies should be appointed where there are no known heirs, creditors, or claimants, because the legislature evidently and intended that the state should receive as large an amount as possible from such escheating estates; a minimum of or no expense would be connected with administration by the public administrator. In re De Nuncio's Estate, 58 Idaho 60, 70 P.2d 380 (1937).

### Prior Right.

The right of a public administrator to take charge of an estate of a person dying within the administrator's county with no known heirs is contingent and subject to termination upon application for appointment as administrator by some other qualified person having a prior right. Vaught v. Struble, 63 Idaho 352, 120 P.2d 259 (1941).

### Resident of One County Dying in Another.

Where a resident of Idaho county dies intestate in Nez Perce County leaving an estate consisting of personal property, and a petition was filed on behalf of a total stranger, it was held that the public administrator of Nez Perce County should have been appointed. In re De Nuncio's Estate, 58 Idaho 60, 70 P.2d 380 (1937).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1905 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-103. Authority prior to appointment — Procurement of letters.** — When a county treasurer is entitled to administer an estate as public administrator, prior to appointment he is authorized to act on behalf of the estate to identify, secure, protect and take charge of all tangible and intangible assets, including incurring reasonable expenses for those purposes, provided that no disbursement from or liquidation of such assets shall be made prior to issuance of letters of administration. Whenever a public administrator takes charge of an estate which he is entitled to administer without letters of administration being issued, or by order of the court, he must, with all convenient dispatch, procure letters of administration thereon. No notice of application for letters by a public administrator is necessary, and his official bond and oath are in lieu of the personal representative's bond and oath, but when real estate is ordered to be sold, another bond may be required by the court. [R.S., R.C., & C.L., § 5682; C.S.,



§ 7777; I.C.A., § 15-1603; am. and redesisg. 1971, ch. 111, §§ 6, 14, p. 233; am. 1999, ch. 104, § 1, p. 328.]

### STATUTORY NOTES

**Cross References.** — "Letters" defined for uniform probate code, § 15-1-201.

Personal representatives, § 15-3-601 et seq.

**Prior Laws.** — Former § 14-103 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

### JUDICIAL DECISIONS

**Cited in:** *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 608, 747 P.2d 18 (1987).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1199 et seq.

**14-104. Death of intestate stranger — Public administrator to be notified.** — Whenever a stranger or person without known heirs, dies intestate in the house or premises of another, the possessor of such premises, or anyone knowing the facts, must give notice thereof to the public administrator of the county within forty-eight (48) hours of knowledge of a death; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested. [R.S., R.C., & C.L., § 5683; C.S., § 7778; I.C.A., § 15-1604; am. and redesisg. 1971, ch. 111, § 6, p. 233; am. 1996, ch. 69, § 2, p. 213.]

### STATUTORY NOTES

**Cross References.** — Effect of discovery of heir, § 14-119.

Public administrator to administer estates of intestate strangers, § 14-102.

**Prior Laws.** — Former § 14-104 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 98, 1098.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-105. Inventory by public administrator — Procedures and distribution of residual.** — (1) The public administrator must make and return an inventory of all assets of estates taken into his possession. Such inventory must include all assets present or ascertainable at the time he takes possession of the estate. He shall administer and account for the same, converting the assets into money according to the provisions of this title, subject to the control and direction of the court.



(2) When, as shown by the inventory, the estate amounts to less than one thousand dollars (\$1,000), no notice to creditors or other formal proceedings by the public administrator are required. The public administrator shall pay funeral expenses, the expenses of the last sickness, administration and such other expenses as may be deemed appropriate by the public administrator including, but not limited to, those enumerated in section 14-120, Idaho Code. After the payment of such expenses, the court must order the residue, if any, paid as may be just to such creditors or heirs as may appear, or into the state treasury with the report of abandoned property required in section 14-517, Idaho Code, upon final distribution of the estate. [R.S., R.C., & C.L., § 5684; C.S., § 7779; I.C.A., § 15-1605; am. and redesign. 1971, ch. 111, §§ 6, 15, p. 233; am. 1996, ch. 69, § 3, p. 213; am. 1999, ch. 104, § 2, p. 328.]

#### STATUTORY NOTES

**Cross References.** — Inventory and appraisement by personal representative, §§ 15-3-706 — 15-3-708.

Small estates, § 15-3-1201 et seq.

**Prior Laws.** — Former § 14-105 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-106. Delivery of estate to executor.** — If, at any time, letters testamentary or letters of administration are regularly granted to any other person on an estate of which the public administrator has charge, the public administrator must, under the order of the magistrate court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers and estate of every kind in his possession or under his control. Upon such transfer and upon funds becoming available to the estate, the county shall be reimbursed immediately for costs, fees and expenses incurred by the public administrator pursuant to the provisions of sections 14-105 and 14-120, Idaho Code. [R.S., R.C., & C.L., § 5685; C.S., § 7780; I.C.A., § 15-1606; am. and redesign. 1971, ch. 111, § 6, p. 233; am. 1999, ch. 104, § 3, p. 328.]

#### STATUTORY NOTES

**Cross References.** — "Letters" defined for uniform probate code, § 15-1-201.

Personal representatives, § 15-3-601 et seq.

Priority among persons seeking appointment as personal representative, § 15-3-203.

**Prior Laws.** — Former § 14-106 was re-

pealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 1202, 1203.

**14-107. Officers to notify administrator of decedent's property.** — All public officials must, within forty-eight (48) hours of knowledge of a death, inform the public administrator of and make available to him all property known to them, belonging to a decedent who resided at the time of death in the county, which is liable to loss, injury or waste, or which, by reason thereof, ought to be in the possession of the public administrator. The public administrator shall be responsible for determining if any heirs or a will exists and shall make burial arrangements in all cases where there are no known personal representatives. [R.S., R.C., & C.L., § 5686; C.S., § 7781; I.C.A., § 15-1607; am. and redesign. 1971, ch. 111, § 6, p. 233; am. 1996, ch. 69, § 4, p. 213.]

## STATUTORY NOTES

**Prior Laws.** — Former § 14-107 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601

— 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-108. Suits to recover property.** — The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers or other estate of the decedent. [1881, p. 294, § 6; R.S., R.C., & C.L., § 5687; C.S., § 7782; I.C.A., § 15-1608; am. and redesign. 1971, ch. 111, § 6, p. 233.]

## STATUTORY NOTES

**Cross References.** — Powers and duties of personal representatives, § 15-3-701 et seq.

**Prior Laws.** — Former § 14-108 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-109. Examination of alleged embezzlers.** — When the public administrator complains to the judge, on oath, that any person has concealed, embezzled or disposed of, or has in his possession any money, goods, property or effects, to the possession of which such administrator is entitled in his official capacity, the judge may cite such person to appear before the

court, and may examine him on oath touching the matter of such complaint. [R.S., R.C., & C.L., § 5688; C.S., § 7783; I.C.A., § 15-1609; am. and redesisg. 1971, ch. 111, §§ 6, 16, p. 233.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-109 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601

— 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

**14-110. Conduct of examination — Contempt.** — All such interrogatories and answers must be reduced to writing and signed by the party examined and filed in the probate court. If the person so cited refuses to appear and submit to such an examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may commit him to the county jail, there to remain in close custody until he submits to the order of the court. [R.S., R.C., & C.L., § 5689; C.S., § 7784; I.C.A., § 15-1610; am. and redesisg. 1971, ch. 111, § 6, p. 233.]

#### STATUTORY NOTES

**Cross References.** — Contempts, § 7-601 et seq.

**Prior Laws.** — Former § 14-110 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — The probate court has been abolished. Section 1-103 of the Idaho Code provides that wherever the words "pro-

bate court" are used they shall mean the district court or the magistrate's division of the district court.

Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

**14-111. Public administrator — Court may require account.** — The court may, at any time, order the public administrator to account for and deliver all the money and property of an estate in his hands to the heirs, or to the executors or administrators regularly appointed. [R.S., R.C., & C.L., § 5690; C.S., § 7785; I.C.A., § 15-1611; am. and redesisg. 1971, ch. 111, §§ 6, 17, p. 233.]

#### STATUTORY NOTES

**Cross References.** — Closing estates, § 15-3-1001 et seq.

**Prior Laws.** — Former § 14-111 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 —

14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-112. Returns by public administrator.** — The public administrator must, once in every six (6) months, make to the judge, under oath, a return of all estates of decedents which have come into his hands, the value of the same, the money which has come into his hands from each estate, and



what he has done with it, and the amount of his fees and expenses incurred, and the balance, if any, remaining in his hands. [R.S., R.C., & C.L., § 5691; C.S., § 7786; I.C.A., § 15-1612; am. and redesign. 1971, ch. 111, §§ 6, 18, p. 233.]

### STATUTORY NOTES

**Cross References.** — Closing estates, § 15-3-1001 et seq.

Distribution of estates, § 15-3-901 et seq.

**Prior Laws.** — Former § 14-112 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-113. Unclaimed moneys — Payment into public school permanent endowment fund — Escheat.** — After a final settlement of the affairs of any estate, if there be no heirs or other claimants thereof, the administrator must pay into the state tax commission any and all moneys and effects which shall accrue and be transferred to the public school permanent endowment fund created pursuant to section 4, article IX, of the constitution of the state of Idaho. [R.S., R.C., & C.L., § 5692; C.S., § 7787; am. 1921, ch. 180, § 1, p. 375; am. 1925, ch. 218, § 4, p. 397; I.C.A., § 15-613; am. and redesign. 1971, ch. 111, §§ 6, 19, p. 233; am. 1984, ch. 36, § 3, p. 60; am. 1996, ch. 69, § 5, p. 213; am. 2007, ch. 97, § 1, p. 280.]

### STATUTORY NOTES

**Cross References.** — Disposition of unclaimed assets, § 15-3-914.

Public school permanent endowment fund, § 33-902.

State tax commission, § 63-101.

**Prior Laws.** — Former § 14-113 was repealed. See Prior Laws, § 14-101.

**Amendments.** — The 2007 amendment, by ch. 97, in the section catchline, substituted "public school permanent endowment fund" for "state treasury"; and substituted the lan-

guage beginning "which shall accrue and be transferred" for "reported as unclaimed property as required by section 14-517, Idaho Code, and the procedure for distribution of abandoned property outlined in the unclaimed property act shall be followed."

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

### JUDICIAL DECISIONS

#### Drainage Warrants.

Where an estate of a deceased owner of drainage district warrants was administered on by the public administrator, because of the lack of heirs of the deceased, and it did not appear that the warrants were a part of the inventory and appraisal of the estate, neither the state nor the state auditor acquired any right or title to the warrants by the mere act of the county officials in trans-

ferring the warrants as collateral for security of county funds to the state auditor. *Roddy v. State*, 65 Idaho 137, 139 P.2d 1005 (1943).

Where drainage district warrants were never a part of the estate of a deceased owner thereof because not inventoried or appraised therein, but were administered by the public administrator because there were no heirs of the deceased owner, the warrants did not pass to the state as escheated property until the

determination of heirship and decree of distribution. *Roddy v. State*, 65 Idaho 137, 139 P.2d 1005 (1943).

**Cited in:** In re Reichert, 95 Idaho 647, 516 P.2d 704 (1973).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-114. Public administrator — Restriction on interest in affairs of estate.** — The public administrator must not be interested in the expenditures of any kind, made on account of any estate he administers, nor must he be associated, in business or otherwise, with anyone who is so interested. [1881, § 4, p. 293; R.S., R.C., & C.L., § 5693; C.S., § 7788; I.C.A., § 15-1614; am. and redesisg. 1971, ch. 111, § 6, p. 233.]

### STATUTORY NOTES

**Cross References.** — Transactions involving a conflict of interest, § 15-3-713.

**Prior Laws.** — Former § 14-114 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 —

14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-115. Proceedings against public administrator.** — When it appears that any money remains in the hands of the public administrator (after a final settlement of the estate) unclaimed, which should be paid over to the state tax commission the judge must order the same to be paid over, and on failure of the public administrator to comply with the order within ten (10) days after the same is made, the prosecuting attorney for the county must immediately institute the requisite legal proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of money so withheld, and costs. [R.S., R.C., & C.L., § 5694; C.S., § 7789; I.C.A., § 15-1615; am. and redesisg. 1971, ch. 111, §§ 6, 20, p. 233.]

### STATUTORY NOTES

**Cross References.** — Public administrator's bond, § 14-101.

State tax commission, § 63-101.

Surety insurance contracts, § 41-2603 et seq.

**Prior Laws.** — Former § 14-115 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.



## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1101.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-116. Provisions of probate code — Application to public administrator.** — When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the Uniform Probate Code must govern. [R.S., R.C., & C.L., § 5695; C.S., § 7790; I.C.A., § 15-1616; am. and redesisg. 1971, ch. 111, §§ 6, 21, p. 233.]

## STATUTORY NOTES

**Cross References.** — Uniform probate Code, § 15-1-101 et seq.

**Prior Laws.** — Former § 14-116 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 —

14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 11-89.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-117. Intestate decedents without heirs or without known heirs — Duty of public administrator — Personal fees not allowed.** — It shall be the mandatory duty of the several county treasurers as ex officio public administrators to cause to be instituted all probate proceedings necessary for the probate of any estate of a decedent whenever such decedent dies intestate without heirs or without known heirs and no creditor's proceeding or other probate proceeding is instituted within three (3) months after such death. No fee shall be allowed to the public administrator or his attorney personally for any service performed in administration of such estates. [1945, ch. 113, § 1, p. 175; am. and redesisg. 1971, ch. 111, § 6, p. 233; am. 1996, ch. 69, § 6, p. 213.]

## STATUTORY NOTES

**Cross References.** — Effect of discovery of heir, § 14-119.

Estates to be administered, § 14-102.

**Prior Laws.** — Former § 14-117 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-118. Prosecuting attorney to represent public administrator.** — It shall be the mandatory duty of the prosecuting attorney of each county to represent the public administrator of such county without charge in all

probate proceedings instituted under this act or chapter 2 of title 14. [1945, ch. 113, § 2, p. 175; am. and redsig. 1971, ch. 111, § 6, p. 233.]

### STATUTORY NOTES

**Cross References.** — Prosecuting attorney, § 31-2601 et seq.

**Prior Laws.** — Former § 14-118 was repealed. See Prior Laws, § 14-101.

**Compiler's Notes.** — The term "this act", used in this section, refers to S.L. 1945, ch. 113, which is presently compiled as §§ 14-117 to 14-119.

"Chapter 2 of title 14", referred to in this section, was repealed by S.L. 1971, ch. 111, § 3. For present comparable provisions, see § 15-3-914.

Sections 14-101 — 14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

**14-119. Effect of discovery of heir.** — In event any heir of a decedent shall be discovered prior to distribution of any estate probated as herein provided, nothing herein contained shall operate to invalidate any probate proceedings had prior to appearance of such heir in the probate proceeding, nor to prevent the completion of such probate proceedings by either public or private administration, as may be ordered by the court. [1945, ch. 113, § 3, p. 175; am. and redsig. 1971, ch. 111, §§ 6, 22, p. 233.]

### STATUTORY NOTES

**Cross References.** — "Heirs" defined for uniform probate code, § 15-1-201.

**Prior Laws.** — Former § 14-119, concerning simultaneous death, which comprised S.L. 1943, ch. 83, § 1, p. 168, was repealed by S.L. 1971, ch. 111, § 3. For present comparable law, see § 15-2-613.

**Compiler's Notes.** — Sections 14-101 —

14-119, which comprised former §§ 15-1601 — 15-1619 were transferred to this title and chapter by § 6 of S.L. 1971, ch. 111, effective July 1, 1972.

The term "herein", referred to twice in this section, means "in S.L. 1949, ch. 113," which is presently compiled as §§ 14-117 to 14-119.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1195 et seq.

**14-120. Costs and fees allowed where heir or creditors refuse to administer estate.** — (1) When an heir or creditor of an estate competent to institute probate proceedings exists, the county treasurer shall not be required to act as public administrator unless an heir or creditor files a petition to appoint a public administrator within one (1) year of the decedent's death.

(2) All reasonable fees, costs and other expenses of administration may be charged by the public administrator against the estate whenever a decedent dies intestate with heirs or creditors competent to institute probate proceedings who refuse to administer the estate. Such reasonable fees and costs shall be paid pursuant to the provisions of section 15-3-805, Idaho Code.

(3) Reasonable fees and costs shall include, but not be limited to, the costs of the public administrator and staff and fees of the prosecuting attorney, subject to approval by the court.

(4) Reimbursement by the estate to the county for time spent by any county employee or elected official on the administration of any such estate

shall be calculated at the actual rate of pay, including benefits, of the individual performing the work. [I.C., § 14-120, as added by 1999, ch. 104, § 4, p. 328.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-120, which comprised S.L. 1943, ch. 83, § 2, p. 10, was repealed by S.L. 1971, ch. 111, § 3.

### **14-121 — 14-128. Simultaneous death act — Disposition of property. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections regarding simultaneous death, which comprised S.L. 1943, ch. 83, §§ 2-10, p. 168, were repealed by S.L. 1971, ch. 111, § 3. For present comparable law, see § 15-2-613.

## CHAPTER 2

### ESCHEATS — ESCHEAT SUSPENSE FUND

#### SECTION.

14-201 — 14-207. [Repealed.]

### **14-201 — 14-207. Escheats — Procedures — Suspense Fund. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections, regarding escheats, which comprised S.L. 1925, ch. 218, §§ 7-13; I.C.A., §§ 14-201 — 14-207, were repealed by S.L. 1971, ch. 111, § 3. For present comparable law, see § 15-3-914.

## CHAPTER 3

### WILLS

#### SECTION.

14-301 — 14-327. [Repealed.]

### **14-301 — 14-327. Wills — Procedures concerning. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections, regarding wills, which comprised R.S., R.C., & C.L., §§ 5725-5750, 5760; S.L. 1915, ch. 17, § 1; C.S., §§ 7808-7833, 7841; 1931, ch. 76, § 1; I.C.A., §§ 14-301 — 14-327, were repealed by S.L. 1971, ch. 111, § 3. For present comparable law, see §§ 15-2-501 — 15-2-614.



## CHAPTER 4

## ESTATE AND TRANSFER TAX

## SECTION.

- 14-401. Short title.
- 14-402. Definitions.
- 14-403. Residents — Tax imposed — Credit for tax paid other state.
- 14-404. Nonresidents — Tax imposed — Exemption.
- 14-404A. Special use valuation — Recapture.
- 14-405. Tax returns — Date to be filed — Extensions.
- 14-406. Date payment due — Date deemed received — Interest.
- 14-407. Amended returns — Final determination.
- 14-408. Refund for overpayments — Limitation.

## SECTION.

- 14-409. Tax as lien — Instruments issued upon payment — Certificate of transfer — Liens on special use property.
- 14-410. Personal representative — Payment of tax — Sale of property — Liability.
- 14-411. Personal representative — Final account — Approval by commission.
- 14-412. Administration and enforcement by commission.
- 14-413. Distribution of receipts.
- 14-414 — 14-430. [Repealed.]

**14-401. Short title.** — This chapter shall be known and may be cited as the “Estate and Transfer Tax Reform Act of 1988.” [I.C., § 14-401, as added by 1988, ch. 300, § 2, p. 952.]

## STATUTORY NOTES

**Prior Laws.** — Former §§ 14-401 — 14-413 which comprised 1929, ch. 243, §§ 1-11, p. 469; I.C.A., §§ 14-401 — 14-411; 1935 (1st Ex. Sess.), ch. 56, §§ 1-4, p. 153; I.C.A., § 14-402a as added by 1941, ch. 171, § 2, p. 342; 1941, ch. 171, § 1, p. 342; 1943, ch. 176, § 1, p. 373; 1947, ch. 37, § 1, p. 38; I.C.A., §§ 14-407a, 14-407b as added by 1955, ch. 13, §§ 1, 2, p. 13; 1955, ch. 13, § 3, p. 13; 1961, ch. 8, § 1, p. 10; 1963, ch. 44, § 1, p. 193; 1971, ch.

111, § 11, p. 233; 1976, ch. 288, § 1, p. 994; 1979, ch. 190, §§ 1, 2, p. 552; 1979, ch. 281, § 1, p. 721; 1981, ch. 82, §§ 1, 2, p. 115; 1981, ch. 87, § 1, p. 120; 1981, ch. 110, § 1, p. 163; 1981, ch. 290, § 12, 13, p. 597; 1982, ch. 113, §§ 1, 2, p. 317; 1982, ch. 247, §§ 1, 2, p. 633; 1984, ch. 115, § 1, p. 259; 1987, ch. 9, § 1, p. 169 were repealed by S.L. 1988, ch. 300, § 1, effective January 1, 1989.

**14-402. Definitions.** — As used in this chapter:

- (1) “Commission” means the Idaho state tax commission.
- (2) “Decedent” means a deceased individual.
- (3) “Federal credit” means the maximum amount of the credit for state death taxes allowed by section 2011 of the United States Internal Revenue Code of 1986, and the maximum amount of the credit for the generation skipping tax allowed by section 2604 of the United States Internal Revenue Code of 1986, in respect to a decedent’s taxable estate.
- (4) “Federal estate tax return” means any form or other document which establishes, changes or amends a federal estate tax amount.
- (5) “Gross estate” means “gross estate” as defined and used in section 2031 of the United States Internal Revenue Code of 1986.
- (6) “Internal Revenue Code of 1986” shall be as defined in section 63-3004, Idaho Code.
- (7) “Nonresident” means a decedent who was domiciled outside Idaho at the time of death.
- (8) “Person” means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture,

syndicate, or other entity and, to the extent permitted by law, any federal, state or other governmental unit or subdivision or agency, department or instrumentality thereof.

(9) "Personal representative" means the executor or administrator of the decedent or, if no executor or administrator is appointed, qualified and acting, any person who has possession of any property.

(10) "Property" means property included in the gross estate.

(11) "Release" means a release of no tax due or a receipt for payment of the tax due under this chapter.

(12) "Resident" means a decedent who was domiciled in Idaho at the time of death.

(13) "Section 2011" means section 2011 of the United States Internal Revenue Code of 1986.

(14) "Section 2032A" means section 2032A of the United States Internal Revenue Code of 1986.

(15) "Section 6501" means section 6501 of the United States Internal Revenue Code of 1986.

(16) "Taxable estate" means "taxable estate" as defined in section 2051 of the United States Internal Revenue Code of 1986.

(17) "Transfer" means "transfer" as defined and used in section 2001 of the United States Internal Revenue Code of 1986. [I.C., § 14-402, as added by 1988, ch. 300, § 2, p. 952; am. 1989, ch. 36, § 1, p. 47; am. 1993, ch. 6, § 1, p. 21; am. 2002, ch. 59, § 2, p. 127.]

#### STATUTORY NOTES

**Cross References.** — State tax commission, art. VII, § 12, Idaho Const. and § 63-101.

**Prior Laws.** — Former § 14-402 was repealed. See Prior Laws, § 14-401.

**Federal References.** — The Internal Revenue Code of 1986, referred to in this section, is compiled as 26 U.S.C. § 1 et seq.

**Effective Dates.** — Section 2 of S.L. 1989, ch. 36 declared an emergency and provided that the act should be effective retroactive to January 1, 1989. Approved March 20, 1989.

Section 3 of S.L. 2002, ch. 59 declared an emergency retroactively to January 1, 2002 and the act was approved March 4, 2002.

**14-403. Residents — Tax imposed — Credit for tax paid other state.** — (1) A tax in an amount equal to the federal credit is imposed on the transfer of the taxable estate of every resident.

(2) If any property of a resident is subject to a death tax imposed by another state of which a credit is allowed by section 2011 and if the tax imposed by the other state is not qualified by a reciprocal provision allowing the property to be taxed in the state of decedent's domicile, the amount of the tax due under this section shall be credited with the lesser of:

(a) The amount of the death tax paid the other state and credited against the federal estate tax; or

(b) An amount computed by multiplying the federal credit by a fraction, the numerator of which is the value of the property subject to the death tax imposed by the other state and the denominator of which is the value of the decedent's gross estate.

(3) Property of a resident includes:

(a) Real property located in this state;

- (b) Tangible personal property having actual situs in this state; and
- (c) Intangible personal property owned by a resident regardless of where it is located. [I.C., § 14-403, as added by 1988, ch. 300, § 2, p. 952.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-403 was repealed. See Prior Laws, § 14-401.

the Internal Revenue Code of 1986 is compiled as 26 U.S.C. § 2011.

**Federal References.** — Section 2011 of

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Calculation of tax.

Taxable transfers.

Valuation of property.

#### Calculation of Tax.

The tax was levied on the value of a distributee's share of the estate less his deductions and exemptions and, accordingly, in calculating the inheritance tax due on one distributee's share, one considered only the property received by the distributee not all the property present in the entire estate. *Estate of Morrison v. Idaho State Tax Comm'n*, 98 Idaho 766, 572 P.2d 869 (1977).

#### Taxable Transfers.

The payment of inheritance taxes by the estate from the residue pursuant to provision in the will was clearly the transfer of property and was subject to tax under former law unless otherwise exempted. *Estate of Morrison v. Idaho State Tax Comm'n*, 98 Idaho 766, 572 P.2d 869 (1977).

While a widow's life estate in community property is not subject to inheritance taxes, the remainder interests are so subject and taxes on them will be assessed according to the market value of the property. *West v. Tax Comm'n*, 99 Idaho 26, 576 P.2d 1060 (1978).

#### Valuation of Property.

Market value is ordinarily defined as the price at which a hypothetical seller, desiring to sell the property but being under no compulsion to do so, and a hypothetical buyer,

desiring to buy the property but under no compulsion to do so, would agree to exchange the property and this definition must control unless a party shows the existence of other market forces affecting the willingness of the parties to make the exchange. *Estate of Morrison v. Idaho State Tax Comm'n*, 98 Idaho 766, 572 P.2d 869 (1977).

While application of a "blockage" concept, reducing the valuation of large blocks of stock because of their lack of liquidity, would be appropriate under proper circumstances, it was erroneous where no showing was made that the stock could not be sold at ordinary market value and where the concept was applied to the entire block of stock in an estate rather than to each distributee's share. *Estate of Morrison v. Idaho State Tax Comm'n*, 98 Idaho 766, 572 P.2d 869 (1977).

Despite a tax commission regulation which provided that United States Treasury bonds may be redeemed at par value if used in payment of federal estate taxes following the death of their holder, under this section the value of United States Treasury bonds for inheritance tax purposes is determined by their value on the open market at the time of the death of their holder. *Stein v. Idaho State Tax Comm'n*, 99 Idaho 70, 577 P.2d 798 (1978).

**14-404. Nonresidents — Tax imposed — Exemption.** — (1) A tax in an amount computed as provided in this section is imposed on the transfer of the taxable estate located in Idaho of every nonresident.

(2) The tax is the amount computed by multiplying the federal credit by a fraction, the numerator of which is the value of the property located in Idaho and the denominator of which is the value of the decedent's gross estate.



(3) The transfer of the property of a nonresident is exempt from the tax imposed in this section to the extent that the same types of property of a resident are exempt from taxation under the laws of the state in which the nonresident resides. [I.C., § 14-404, as added by 1988, ch. 300, § 2, p. 952.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-404 was repealed. See Prior Laws, § 14-401.

**14-404A. Special use valuation — Recapture.** — If property valued under the special use valuation provisions of section 2032A ceases to qualify for special use valuation within the recapture period provided in section 2032A, an additional tax, equal to the amount of any increase in the state death tax credit allowed under section 2011 attributable to the change in the value of the estate resulting from the recapture required by section 2032A shall be due. The person required to provide notice to the internal revenue service that property subject to special use valuation has ceased to qualify for such valuation shall provide a copy of such notice to the commission. The limit upon assessment of the additional tax imposed by the provisions of this section, including any penalty and interest, shall be one (1) year from the date on which the commission receives such notice. [I.C., § 14-404A, as added by 1993, ch. 6, § 2, p. 21.]

#### STATUTORY NOTES

**Federal References.** — Sections 2011 and 2032A of the Internal Revenue Code, referred to in this section, are compiled as 26 U.S.C. §§ 2011 and 2032A, respectively.

**14-405. Tax returns — Date to be filed — Extensions.** — (1) The personal representative of every estate subject to the tax imposed in this chapter who is required by the laws of the United States to file a federal estate tax return shall file with the commission on or before the date the federal estate tax return is required to be filed, including any extension of time for filing the federal estate tax return:

- (a) A return for the taxes due under this chapter; and
- (b) A copy of the federal estate tax return.

(2) If the personal representative has obtained an extension of time for filing the federal estate tax return, the filing required by subsection (1) of this section shall be similarly extended until the end of the time period granted in the extension of time for the federal estate tax return. A copy of the extension shall be filed with the commission within thirty (30) days of issuance.

(3) In addition to the extension of time for filing the return for the tax due under this chapter provided for under subsection (2) of this section, the commission, upon good cause shown, may extend the time for filing this return for any further period of time determined by the commission to be proper.

(4) No Idaho return need be filed if the estate is not subject to the tax imposed in this chapter. [I.C., § 14-405, as added by 1988, ch. 300, § 2, p. 952.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-405 was repealed. See Prior Laws, § 14-401.

#### **14-406. Date payment due — Date deemed received — Interest. —**

(1) Any tax due under this chapter shall be paid by the personal representative to the commission on or before the date the return for the taxes is required to be filed under section 14-405, Idaho Code.

(2) For the purposes of this chapter, a return or payment delivered to the commission by United States mail shall be considered to have been received by the commission on the date of the United States postmark stamped on the cover in which the payment or the request for release of nonliability is mailed, if the postmark date is within the time allowed for filing the return or making the payment, including any extensions.

(3) The commission, for good cause shown, may extend the time for payment of the tax due under this chapter beyond the date of payment provided for in subsection (1) of this section, but no extension for payment of this tax may be granted in excess of fourteen (14) years from the date the tax was due.

(4) Any tax due under this chapter which is not paid by the time prescribed for the filing of the return as provided in section 14-405, Idaho Code, not including any extensions in respect to the filing of the return or the payment of the tax, shall bear interest at the rate provided for in section 63-3045, Idaho Code, from the date any tax is due until paid. [I.C., § 14-406, as added by 1988, ch. 300, § 2, p. 952.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-406 was repealed. See Prior Laws, § 14-401.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### **Commencement of Probate Proceedings — Effect.**

Commencement of a probate proceeding could not have been construed as an action for recovery of transfer taxes under the transfer

and inheritance tax act, commenced by and on behalf of the state. *White v. Conference Claimants Endowment Comm'n*, 81 Idaho 17, 336 P.2d 674 (1959).

**14-407. Amended returns — Final determination. —** (1) If the personal representative files an amended federal estate tax return, the personal representative shall immediately file with the commission an amended return covering the tax imposed by this chapter together with a copy of the amended federal estate tax return. If the personal representative

is required to pay an additional tax under this chapter pursuant to the amended return, the personal representative shall pay the additional tax, together with interest as provided in section 14-406, Idaho Code, at the same time the personal representative files the amended return.

(2) Upon final determination of the federal tax due with respect to any transfer, the personal representative shall, within sixty (60) days after the determination, give written notice of it to the commission in such form as may be prescribed by rule. If any additional tax is due under this chapter by reason of the determination, the personal representative shall pay the same, together with interest as provided in section 14-406, Idaho Code, at the same time he files the notice. [I.C., § 14-407, as added by 1988, ch. 300, § 2, p. 952.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-407 was repealed. See Prior Laws, § 14-401.

**14-408. Refund for overpayments — Limitation.** — If the commission determines that a personal representative has overpaid the tax due under this chapter, the commission is authorized to refund the amount of the overpayment, together with interest at the rate provided for in section 63-3045, Idaho Code, provided, however, that in case of a voluntary and unrequested payment in excess of actual tax liability, no interest shall be allowed when such excess is refunded.

No claim for refund may be initiated more than three (3) years after the date of a federal estate tax closing letter or an amended federal estate tax closing letter. [I.C., § 14-408, as added by 1988, ch. 300, § 2, p. 952; am. 1990, ch. 20, § 1, p. 32.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-408 was repealed. See Prior Laws, § 14-401.

**14-409. Tax as lien — Instruments issued upon payment — Certificate of transfer — Liens on special use property.** — (1) The tax provided for in this chapter, together with applicable interest and penalties, shall be and remain a lien on the decedent's estate from the time of the death of the decedent until paid.

(2) Upon payment of the tax, together with applicable interest and penalties, the commission shall issue to the personal representative a receipt reflecting payment, a certificate of transfer and any other appropriate instruments reflecting payment.

(3) In addition to the lien imposed in subsection (1) of this section, a lien is hereby imposed upon the property which is valued according to section 2032A. This additional lien shall be for the amount of tax which would have been due under the provisions of this chapter had the property not been valued according to section 2032A. This lien shall remain upon the property until the recapture period required in section 2032A has expired or until any



additional tax imposed in section 14-404A, Idaho Code, has been paid. [I.C., § 14-409, as added by 1988, ch. 300, § 2, p. 952; am. 1993, ch. 6, § 3, p. 21.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-409 was repealed. See Prior Laws, § 14-401.

**Federal References.** — Section 2032A of the Internal Revenue Code, referred to in subsection (3), is compiled as 26 U.S.C. § 2032A.

**14-410. Personal representative — Payment of tax — Sale of property — Liability.** — (1) The personal representative has the duty to pay the tax, together with applicable interest and penalties, imposed on property under this chapter. The personal representative may sell so much of the property regardless of whether any portion of the property is included in a specific bequest or devise, as is necessary to pay the proportionate amount of the tax due under this chapter, together with applicable interest and penalties, and the fees and expenses of the sale, unless the legatee or devisee pays the personal representative the proportionate part of the tax due.

(2) Any personal representative who distributes any portion of the property without first paying the tax imposed by this chapter on that property, including applicable interest and penalties, or having another make the payment, is personally liable for the tax, including applicable interest and penalties. [I.C., § 14-410, as added by 1988, ch. 300, § 2, p. 952.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-410 was repealed. See Prior Laws, § 14-401.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Purchaser without notice held not liable for tax payment.

#### **Purchaser Without Notice Held Not Liable for Tax Payment.**

In a quiet title action, where the action for the enforcement of tax was barred by the statute of limitations, and plaintiff had purchased the property for full value on an open market, and had no constructive or actual notice that there was an unpaid tax due to the state against that property, and the statute

placed no burden on the purchasers under these circumstances to inquire beyond the public records as to possible claims or liens not of record, the dismissal of the cross-complaint was proper although the tax had not been paid and was a lien on the property. *Hagan v. Young*, 64 Idaho 318, 132 P.2d 140 (1942).

**14-411. Personal representative — Final account — Approval by commission.** — (1) No final account of a personal representative in any probate proceeding who is required to file a federal estate tax return may be allowed and approved by the court before whom the proceeding is pending unless it is shown by evidence satisfactory to the commission and the court

finds that the tax imposed on the property in this chapter, including applicable interest and penalties, has been paid in full, that an agreement for the payment of the tax on an installment basis has been entered into, or that no tax is due.

(2) The commission shall have the authority to determine the fair market value of property subject to tax under this chapter and in making such determination, the commission may require that appraisals or other necessary information be supplied by the personal representative. Any deficiencies must be asserted and assessments made within the time limitations as set forth under section 6501 and the regulations thereunder. [I.C., § 14-411, as added by 1988, ch. 300, § 2, p. 952.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-411 was repealed. See Prior Laws, § 14-401.

the Internal Revenue Code of 1986, referred to near the end of the section, is compiled as 26 U.S.C. § 6501.

**Federal References.** — Section 6501 of

#### **14-412. Administration and enforcement by commission. —**

(1) The commission is charged with the administration and enforcement of the provisions of this chapter and may adopt such rules as may be necessary to effectuate the purposes of this chapter.

(2) The commission shall collect the tax provided for under this chapter, including applicable interest and penalties, and shall represent this state in all matters pertaining to collection, either before courts or otherwise. Provisions set forth in sections 63-3038, 63-3039, 63-3042 through 63-3065A, 63-3069, 63-3071, 63-3072, 63-3075, 63-3076 and 63-3077, Idaho Code, which deal with deficiency, collection, enforcement, refund and review procedures, shall apply and be available to the commission and personal representative, to the extent they are not in conflict with the provisions of this chapter. Said sections shall be considered a part of this chapter and wherever proceedings are defined as income tax proceedings, they shall, as applied to this chapter, be described as estate tax proceedings. [I.C., § 14-412, as added by 1988, ch. 300, § 2, p. 952.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-412 was repealed. See Prior Laws, § 14-401.

**14-413. Distribution of receipts. —** The commission shall collect all taxes and moneys that may be due under this act, and remit such moneys to the state treasurer. Such moneys shall be distributed as follows:

(1) Ten percent (10%) of such moneys shall be distributed into a suspense account for payment to the county treasurer of the county in which venue for probate and administration lies, pursuant to section 15-3-201, Idaho Code, regardless of whether such probate or administration was, in fact, instituted. Such moneys shall be paid by the commission to the appropriate counties not less than quarterly, and shall be credited to the county current expense fund.

(2) An amount of money shall be distributed to the state refund account sufficient to pay current refund claims. All refunds authorized by the commission to be paid shall be paid through the state refund account, and those moneys are hereby continuously appropriated for that purpose. Such refunds shall be authorized for the purpose of repaying overpayments made under the transfer and inheritance tax act, for the purpose of repaying any other erroneous receipts under such tax, for the purpose of repaying any tax, penalty, or interest illegally assessed or collected, or for the purpose of paying any judgment rendered against the commission under the terms and provisions of this act.

(3) The balance remaining after distributing the amounts in subsections (1) and (2) of this section shall be distributed to the general fund of the state of Idaho. [I.C., § 14-413, as added by 1988, ch. 300, § 2, p. 952; am. 1992, ch. 270, § 1, p. 836; am. 2000, ch. 60, § 1, p. 131.]

#### STATUTORY NOTES

**Cross References.** — State refund account, § 63-3067.

**Prior Laws.** — Former § 14-413 was repealed. See Prior Laws, § 14-401.

**Compiler's Notes.** — The words "this act" refer to S.L. 1988, ch. 300, which is compiled as §§ 14-401 — 14-413.

The transfer and inheritance tax act, referred to in subsection (2), was repealed by S.L. 1988, ch. 300, § 1 and was replaced by the estate and transfer tax reform act of 1988, codified as § 14-401 et seq.

Section 3 of S.L. 1988, ch. 300 read: "The

provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

**Effective Dates.** — Section 4 of S.L. 1988, ch. 300 provided that the act should take effect on and after January 1, 1989.

Section 4 of S.L. 2000, ch. 60 provided that the act shall be in full force and effect on and after July 1, 2000.

### 14-414. Receipt for payment of tax — Distribution prohibited until tax is paid. [Repealed.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised 1929, ch. 243, § 12, p. 469; I.C.A., § 14-412; am. 1969, ch. 20, § 1, p. 39; am. 1970, ch. 174, § 1, p. 503; am. 1971, ch. 34, § 1, p. 78; am. 1972, ch. 202, § 9, p. 535; am. 1982, ch. 113, § 3, p. 317, was repealed by S.L. 1988, ch. 300, § 1, effective January 1, 1989.

### 14-415. Refund of tax. [Repealed.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised S.L. 1929, ch. 243, § 13; I.C.A., § 14-413, was repealed by S.L. 1972, ch. 202, § 10.



**14-416 — 14-418. Inspection of books — Restrictions on stock transfers — Inheritance tax determination. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — These sections, which comprised 1929, ch. 243, §§ 14, 15, p. 469; 1931, ch. 131, § 1, p. 227; I.C.A., §§ 14-414, 14-415; 1937, ch. 75, § 1, p. 100; I.C., § 14-418, as added by 1971, ch. 111, § 12, p. 233; 1972, ch. 202, §§ 11-13, p. 535; 1974, ch. 123, § 1, p. 1299; am. 1981, ch. 290, § 14, p. 597; am. 1982, ch. 113, §§ 4, 5, p. 317; am. 1987, ch. 90, § 2, p. 169, were repealed by S.L. 1988, ch. 300, § 1, effective January 1, 1989.

**14-419 — 14-423. Venue — Appraisement — Procedures for determining tax on certain transactions — Appeal from order fixing tax — Orders, decrees and judgments. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — These sections, which comprised S.L. 1929, ch. 243, §§ 17-21; I.C.A., §§ 14-417 — 14-421, were repealed by S.L. 1971, ch. 111, § 4, effective July 1, 1972.

**14-424 — 14-428. Copies of papers and orders to be furnished — Collection of taxes — Fees, compensation and expenses — Penalties. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — These sections which comprised 1929, ch. 243, §§ 22-26, p. 469; I.C.A., §§ 14-422 — 14-426; 1969, ch. 20, §§ 2, 3, p. 39; am. 1970, ch. 174, §§ 2, 3, p. 503; am. 1971, ch. 34, §§ 2, 3, p. 78; am. 1972, ch. 202, §§ 15-17, p. 535; 1976, ch. 218, § 1, p. 790; am. 1979, ch. 325, § 3, p. 833; am. 1980, ch. 383, § 1, p. 971; am. 1980, ch. 384, § 1, p. 973; am. 1986, ch. 345, § 1, p. 852; am. 1987, ch. 260, § 1, p. 545, were repealed by S.L. 1988, ch. 300, § 1, effective January 1, 1989.

**14-429. Fees of commissioner of finance. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C.A., § 14-429, as added by 1935 (1st Ex. Sess.), ch. 57, § 1, p. 158; am. 1943, ch. 163, § 1, p. 341, was repealed by S.L. 1969, ch. 336, § 2.

**14-430. Severability. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section which comprised 1929, ch. 243, § 27, p. 469; I.C.A., § 14-427, was repealed by S.L. 1988, ch. 300, § 1, effective January 1, 1989.

## CHAPTER 5

## UNCLAIMED PROPERTY LAW

## SECTION.

14-501. Definitions and use of terms.

14-501A. [Repealed.]

14-502. Property presumed abandoned — General rule.

14-503. General rules for taking custody of intangible unclaimed property.

14-504. Travelers checks and money orders.

14-505. Checks, drafts and similar instruments issued or certified by banking and financial organizations.

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## SECTION.

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14-537. Foreign transactions.

14-538. [Repealed.]

14-539. Rules.

14-540. Uniformity of application and construction.

14-541. Short title.

14-542. Exemption.

14-543. Successors' liability.

**14-501. Definitions and use of terms.** — As used in this chapter:

(1) "Administrator" means the state tax commission or its duly authorized agents or employees.

(2) "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.

(3) "Attorney general" means the chief legal officer of this state.

(4) "Banking organization" means a bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, or any organization defined by other law as a bank or banking organization.

(5) "Business association" means a nonpublic corporation, limited liability company, joint stock company, investment company, business trust, partnership, or association for business purposes of two (2) or more

individuals, whether or not for profit, including, but not limited to, a banking organization, financial organization, insurance company, or utility.

(6) "Domicile" means the state of incorporation of a corporation and the state of the principal place of business of an unincorporated person.

(7) "Financial organization" means a savings and loan association, cooperative bank, building and loan association, investment company, or credit union.

(8) "Holder" means a person, wherever organized or domiciled, who is:

- (a) In possession of property belonging to another;
- (b) A trustee; or
- (c) Indebted to another on an obligation.

(9) "Insurance company" means an association, corporation, fraternal or mutual benefit organization, whether or not for profit, which is engaged in providing insurance coverage, including accident, burial, casualty, credit life, contract performance, dental, fidelity, fire, health, hospitalization, illness, life, including endowments and annuities, malpractice, marine, mortgage, surety, and wage protection insurance.

(10) "Intangible property" includes:

- (a) Monies, checks, drafts, deposits, interest, dividends, and income;
- (b) Credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances;
- (c) Stocks and other intangible ownership interests in business associations;
- (d) Amounts paid for tickets, passes or vouchers to gain entrance to a scheduled event where the scheduled event was cancelled and not rescheduled, and the owner of the tickets, passes or vouchers is entitled to a refund in cash, services or merchandise;
- (e) Monies deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions;
- (f) Amounts due and payable under the terms of insurance policies;
- (g) Amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits; and
- (h) Any interest created by a judgment entered in any court of competent jurisdiction in favor of persons who are members of a class of persons defined by the court entering the judgment.

(11) "Last known address" means a description of the location of the apparent owner sufficient for the purpose of the delivery of mail.

(12) "Owner" means a depositor in the case of a deposit, a beneficiary in case of a trust other than a deposit in trust, a creditor, claimant, or payee in the case of other intangible property, or a person having a legal or equitable interest in property subject to this act or his legal representative.

(13) "Person" means an individual, business association, state or other government, governmental subdivision or agency, public corporation, public authority, estate, trust, two (2) or more persons having a joint or common interest, or any other legal or commercial entity.



(14) "State" means any state, district, commonwealth, territory, insular possession, or any other area subject to the legislative authority of the United States.

(15) "Utility" means a person who owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas. [I.C., § 14-501, as added by 1983, ch. 209, § 2, p. 563; am. 1984, ch. 36, § 1, p. 60; am. 1997, ch. 399, § 1, p. 1262.]

### STATUTORY NOTES

**Cross References.** — Attorney general, § 67-1401 et seq.

State tax commission, art. VII, § 12, Idaho Const. and § 63-101.

**Prior Laws.** — Former §§ 14-501 — 14-532, which comprised I.C., §§ 14-501 — 14-531, as added by 1961, ch. 162, § 1, p. 239; am. 1963, ch. 291, §§ 1, 2, p. 771; am. 1963, ch. 329, § 1, p. 943; am. 1967, ch. 372, § 1, p. 1070; I.C., § 14-532, as added by 1963, ch. 346, § 1, p. 985, were repealed by S.L. 1980, ch. 281, § 1, effective March 31, 1980.

Another former §§ 14-501 — 14-541, which comprised I.C., §§ 14-501 — 14-541, as added by 1980, ch. 281, § 2, p. 730, were repealed by S.L. 1983, ch. 209, § 1.

**Compiler's Notes.** — The term "this act", as used in paragraph (12), refers to S.L. 1983, ch. 209, which is codified as §§ 14-501, 14-502 to 14-532, 14-534 to 14-537, and 14-539 to 14-541.

**Effective Dates.** — Section 19 of S.L.

1997, ch. 399 read, "This act shall be in full force and effect on and after its passage and approval, and shall be effective July 1, 1997, except that this act shall have retroactive application to January 1, 1981, for the purposes of any audits or similar adjustments proposed by the administrator to ascertain compliance with the provisions of chapter 5, title 14, Idaho Code, in effect from January 1, 1981, to July 1, 1997. No person who has paid unclaimed property to the administrator between January 1, 1981, and July 1, 1997, shall have any right or claim to a refund or repayment of such unclaimed property or the value thereof solely because of the limited retroactive application of this act."

**Comparable Provisions.** — Mont. Code Ann. § 70-9-801 et seq.

Nev. Rev. Stat. § 120A.010 et seq.

Utah Code Ann. § 67-4a-1.

Wash. Rev. Code § 63.29.010 et seq.

### OPINIONS OF ATTORNEY GENERAL

This state, acting through the state tax commission has authority to take possession of unclaimed property recovered from safe deposit boxes or other safekeeping reposi-

ries of national banks closed during the 1930's and before, which property is now in the custody of the United States comptroller of the currency. OAG 83-10.

### 14-501A. General principles. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — This section which comprised I.C., § 14-501A, as added by 1994,

ch. 124, § 1, p. 382 was repealed by S.L. 1997, ch. 399, § 2, effective July 1, 1997.

**14-502. Property presumed abandoned — General rule.** — (1) Except as otherwise provided by this chapter, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than five (5) years after it became payable or distributable is presumed abandoned.

(2) Notwithstanding subsection (1) of this section, the following items shall not constitute abandoned property for the purposes of this act:

- (a) Amounts withheld by a business association as a penalty or forfeiture or as damages in the event a person who has reserved the services of the business association fails to make use of and pay for the service;
- (b) Gift certificates with an expiration date prominently displayed on their face;
- (c) Nonrefundable airline tickets;
- (d) Any certificate, pass, voucher or other evidence of a right or privilege which is nonrefundable or which is nonredeemable due to the passage of time;
- (e) Any intangible property as defined in section 14-501, Idaho Code, with a value of fifty dollars (\$50.00) or less.

(3) Property is payable or distributable for the purpose of this chapter notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment. [I.C., § 14-502, as added by 1983, ch. 209, § 2, p. 563; am. 1992, ch. 21, § 1, p. 67; am. 1997, ch. 399, § 3, p. 1262.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-502 was repealed. See Prior Laws, § 14-501.

**Compiler's Notes.** — The term "this act", as used in the introductory paragraph in subsection (2), was added by S.L. 1997, ch. 399, which is codified as §§ 14-501, 14-502,

14-504, 14-508, 14-512, 14-514, 14-517 to 14-519, 14-523, 14-524, 14-529 to 14-531, 14-533, and 14-543. Presumably, the reference should be to "this chapter", meaning chapter 5 of title 14, Idaho Code.

**14-503. General rules for taking custody of intangible unclaimed property.** — Unless otherwise provided in this chapter or by other statute of this state, intangible property is subject to the custody of this state as unclaimed property if the conditions raising a presumption of abandonment under sections 14-502 and 14-505 through 14-516, Idaho Code, are satisfied and:

(1) The last known address, as shown on the records of the holder, of the apparent owner is in this state;

(2) The records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this state;

(3) The records of the holder do not reflect the last known address of the apparent owner, and it is established that:

(a) The last known address of the person entitled to the property is in this state, or

(b) The holder is a domiciliary or a government or governmental subdivision or agency of this state and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) The last known address, as shown on the records of the holder, of the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is



not applicable to the property and the holder is a domiciliary or a government or governmental subdivision or agency of this state;

(5) The last known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary or a government or governmental subdivision or agency of this state; or

(6) The transaction out of which the property arose occurred in this state; and

(a)1. The last known address of the apparent owner or other person entitled to the property is unknown, or

2. The last known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property; and

(b) The holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property. [I.C., § 14-503, as added by 1983, ch. 209, § 2, p. 563.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-503 was repealed. See Prior Laws, § 14-501.

#### OPINIONS OF ATTORNEY GENERAL

This state, acting through the state tax commission has authority to take possession of unclaimed property recovered from safe deposit boxes or other safekeeping reposi-

ries of national banks closed during the 1930's and before, which property is now in the custody of the United States comptroller of the currency. OAG 83-10.

**14-504. Travelers checks and money orders.** — (1) Subject to subsection (4) of this section, any sum payable on a travelers check that has been outstanding for more than fifteen (15) years after its issuance is presumed abandoned unless the owner, within fifteen (15) years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the issuer.

(2) Subject to subsection (4) of this section, any sum payable on a money order or similar written instrument, other than a third-party bank check, that has been outstanding for more than seven (7) years after its issuance is presumed abandoned unless the owner, within seven (7) years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the issuer.

(3) A holder may not deduct from the amount of a travelers check or money order any charge imposed by reason of the failure to present the instrument for payment unless there is a valid and enforceable written contract between the issuer and the owner of the instrument pursuant to which the issuer may impose a charge and the issuer regularly imposes such charges and does not regularly reverse or otherwise cancel them.

(4) No sum payable on a travelers check, money order, or similar written instrument, other than a third-party bank check, described in subsections (1) and (2) of this section may be subjected to the custody of this state as unclaimed property unless:

- (a) The records of the issuer show that the travelers check, money order, or similar written instrument was purchased in this state;
- (b) The issuer has its principal place of business in this state and the records of the issuer do not show the state in which the travelers check, money order, or similar written instrument was purchased; or
- (c) The issuer has its principal place of business in this state, the records of the issuer show the state in which the travelers check, money order, or similar written instrument was purchased and the laws of the state of purchase do not provide for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property. [I.C., § 14-504, as added by 1983, ch. 209, § 2, p. 563; am. 1997, ch. 399, § 4, p. 1262.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-504 was repealed. See Prior Laws, § 14-501.

**14-505. Checks, drafts and similar instruments issued or certified by banking and financial organizations.** — (1) Any sum payable on a check, draft, or similar instrument, except those subject to section 14-504, Idaho Code, on which a banking or financial organization is directly liable, including a cashier's check and a certified check, which has been outstanding for more than five (5) years after it was payable or after its issuance if payable on demand, is presumed abandoned, unless the owner, within five (5) years, has communicated in writing with the banking or financial organization concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee thereof.

(2) A holder may not deduct from the amount of any instrument subject to this section any charge imposed by reason of the failure to present the instrument for payment unless there is a valid and enforceable written contract between the holder and the owner of the instrument pursuant to which the holder may impose a charge, and the holder regularly imposes such charges and does not regularly reverse or otherwise cancel them. [I.C., § 14-505, as added by 1983, ch. 209, § 2, p. 563; am. 2002, ch. 152, § 1, p. 443.]

**14-506. Bank deposits and funds in financial organizations.** — (1) Any demand, savings, or matured time deposit with a banking or financial organization, including a deposit that is automatically renewable, and any funds paid toward the purchase of a share, a mutual investment certificate, or any other interest in a banking or financial organization is presumed abandoned unless the owner, within five (5) years, has:

- (a) In the case of a deposit, increased or decreased its amount or presented the passbook or other similar evidence of the deposit for the crediting of interest;
  - (b) Communicated in writing with the banking or financial organization concerning the property;
  - (c) Otherwise established that the owner is currently aware of his interest in the property as evidenced by a memorandum or other record on file prepared by an employee of the banking or financial organization describing the activity of the owner which establishes that the owner is currently aware of his interest in the property stating the date of such activity and the address of the owner as of that date;
  - (d) Owned other property to which paragraph (a), (b) or (c) of this subsection applies and if the banking or financial organization communicates in writing with the owner with regard to the property that would otherwise be presumed abandoned under this subsection at the address to which communications regarding the other property regularly are sent; or
  - (e) Had another relationship with the banking or financial organization concerning which the owner has:
    - 1. Communicated in writing with the banking or financial organization; or
    - 2. Otherwise established that the owner is currently aware of his interest as evidenced by a memorandum or other record on file prepared by an employee of the banking or financial organization describing the activity of the owner which establishes that the owner is currently aware of his interest, stating the date of such activity and the address of the owner as of that date.
- (2) For purposes of subsection (1) of this section, property includes interest and dividends.
- (3) A holder may not impose with respect to property described in subsection (1) of this section any charge due to dormancy or inactivity or cease payment of interest unless:
- (a) There is an enforceable written contract between the holder and the owner of the property pursuant to which the holder may impose a charge or cease payment of interest;
  - (b) For property in excess of two dollars (\$2.00), the holder, no more than three (3) months before the initial imposition of those charges or cessation of interest, has given written notice to the owner of the amount of those charges at the last known address of the owner stating that those charges will be imposed or that interest will cease, but the notice provided in this section need not be given with respect to charges imposed or interest ceased before the effective date of this chapter; and
  - (c) The holder regularly imposes such charges or ceases payment of interest and does not regularly reverse or otherwise cancel them or retroactively credit interest with respect to the property.
- (4) Any property described in subsection (1) of this section that is automatically renewable is matured for purposes of subsection (1) of this section upon the expiration of its initial time period, but in the case of any renewal to which the owner consents at or about the time of renewal by



communicating in writing with the banking or financial organization, the property is matured upon the expiration of the last time period for which consent was given. If, at the time provided for delivery in section 14-519, Idaho Code, a penalty or forfeiture in the payment of interest would result from the delivery of the property, the time for delivery is extended until the time when no penalty or forfeiture would result. [I.C., § 14-506, as added by 1983, ch. 209, § 2, p. 563; am. 2002, ch. 152, § 2, p. 443.]

#### STATUTORY NOTES

**Compiler's Notes.** — The phrase, “effective date of this chapter”, near the end of paragraph (3)(b), refers to the effective date of S.L. 1983, ch. 209, which was July 1, 1983.

**14-507. Funds owing under life insurance policies.** — (1) Funds held or owing under any life or endowment insurance policy or annuity contract that has matured or terminated are presumed abandoned if unclaimed for more than five (5) years after the funds become due and payable as established from the records of the insurance company holding or owing the funds, but property described in subsection (3)(b) of this section is presumed abandoned if unclaimed for more than two (2) years.

(2) If a person other than the insured or annuitant is entitled to the funds and an address of the person is not known to the company or it is not definite and certain from the records of the company who is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the company.

(3) For purposes of this chapter, a life or endowment insurance policy or annuity contract not matured by actual proof of the death of the insured or annuitant according to the records of the company is matured and the proceeds due and payable if:

- (a) The company knows that the insured or annuitant has died; or
- (b) 1. The insured has attained, or would have attained if he were living, the limiting age under the mortality table on which the reserve is based;
- 2. The policy was in force at the time the insured attained, or would have attained, the limiting age specified in subparagraph 1.; and
- 3. Neither the insured nor any other person appearing to have an interest in the policy within the preceding two (2) years, according to the records of the company, has assigned, readjusted, or paid premiums on the policy, subjected the policy to a loan, or corresponded in writing with the company concerning the policy.

(4) For purposes of this chapter, the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from being matured or terminated under subsection (1) of this section if the insured has died or the insured or the beneficiary of the policy otherwise has become entitled to the proceeds thereof before the depletion of the cash surrender value of a policy by the application of those provisions.

(5) If the laws of this state or the terms of the life insurance policy require the company to give notice to the insured or owner that an automatic

premium loan provision or other nonforfeiture provision has been exercised and the notice, given to an insured or owner whose last known address according to the records of the company is in this state, is undeliverable, the company shall make a reasonable search to ascertain the policyholder's correct address to which the notice must be mailed.

(6) Notwithstanding any other provision of law, if the company learns of the death of the insured or annuitant and the beneficiary has not communicated with the insurer within four (4) months after the death, the company shall take reasonable steps to pay the proceeds to the beneficiary.

(7) Commencing two (2) years after the effective date of this chapter, every change of beneficiary form issued by an insurance company under any life or endowment insurance policy or annuity contract to an insured or owner who is a resident of this state must request the following information:

- (a) The name of each beneficiary, or if a class of beneficiaries is named, the name of each current beneficiary in the class;
- (b) The address of each beneficiary; and
- (c) The relationship of each beneficiary to the insured. [I.C., § 14-507, as added by 1983, ch. 209, § 2, p. 563.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-507 was repealed. See Prior Laws, § 14-501.

**Compiler's Notes.** — The phrase "effective date of this chapter", in the introductory

paragraph in subsection (7), refers to the effective date of S.L. 1983, ch. 209, which was July 1, 1983.

**14-508. Deposits held by utilities.** — (1) A deposit, including any interest thereon, made by a subscriber with a utility to secure payment or any sum paid in advance for utility services to be furnished, less any lawful deductions, that remains unclaimed by the owner for more than one (1) year after termination of services for which the deposit or advance payment was made is presumed abandoned.

(2) The public utilities commission may certify that a utility is participating in a financial assistance program which assists the utility's low income and disadvantaged customers with their utility bills. Upon certification to the administrator, the utility shall pay the funds which would have been presumed to be abandoned under subsection (1) of this section to the financial assistance program certified by the public utilities commission. The utility shall remain obligated to file its report of such abandoned property as required by section 14-517, Idaho Code. [I.C., § 14-508, as added by 1983, ch. 209, § 2, p. 563; am. 1997, ch. 399, § 5, p. 1262.]

#### STATUTORY NOTES

**Cross References.** — Public utilities commission, § 61-201 et seq.

**Prior Laws.** — Former § 14-508 was repealed. See Prior Laws, § 14-501.

**14-509. Refund held by business associations.** — Except to the extent otherwise ordered by the court or administrative agency, any sum that a business association has been ordered to refund by a court or



administrative agency which has remained unclaimed by the owner for more than one (1) year after it became payable in accordance with the final determination or order providing for the refund, whether or not the final determination or order requires any person entitled to a refund to make a claim for it, is presumed abandoned. [I.C., § 14-509, as added by 1983, ch. 209, § 2, p. 563.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-509 was repealed. See Prior Laws, § 14-501.

**14-510. Stock and other intangible interests in business associations.** — (1) Except as provided in subsections (2) and (5) of this section, stock or other intangible ownership interest in a business association, the existence of which is evidenced by records available to the association, is presumed abandoned and, with respect to the interest, the association is the holder, if a dividend, distribution, or other sum payable as a result of the interest has remained unclaimed by the owner for five (5) years and the owner, within five (5) years, has not communicated in writing with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest.

(2) At the expiration of a five (5) year period following the failure of the owner to claim a dividend, distribution, or other sum payable to the owner as a result of the interest, the interest is not presumed abandoned unless there have been at least five (5) dividends, distributions, or other sums paid during the period, none of which has been claimed by the owner. If five (5) dividends, distributions, or other sums are paid during the five (5) year period, the period leading to a presumption of abandonment commences on the date payment of the first such unclaimed dividend, distribution, or other sum became due and payable. If five (5) dividends, distributions, or other sums are not paid during the presumptive period, the period continues to run until there have been five (5) dividends, distributions, or other sums that have not been claimed by the owner.

(3) The running of the five (5) year period of abandonment ceases immediately upon the occurrence of a communication referred to in subsection (1) of this section. If any future dividend, distribution, or other sum payable to the owner as a result of the interest is subsequently not claimed by the owner, a new period of abandonment commences and relates back to the time a subsequent dividend, distribution, or other sum became due and payable.

(4) At the time an interest is presumed abandoned under this section, any dividend, distribution, or other sum then held for or owing to the owner as a result of the interest, and not previously presumed abandoned, is presumed abandoned.

(5) This chapter does not apply to any stock or other intangible ownership interest enrolled in a plan that provides for the automatic reinvestment of dividends, distributions, or other sums payable as a result of the interest unless the records available to the administrator of the plan show, that the

owner has not within five (5) years communicated in any manner described in subsection (1) of this section. The holder shall maintain the record of such communications. [I.C., § 14-510, as added by 1983, ch. 209, § 2, p. 563; am. 1992, ch. 21, § 2, p. 67.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-510 was repealed. See Prior Laws, § 14-501.

**14-511. Property of business associations held in course of dissolution.** — Intangible property distributable in the course of a dissolution of a business association which remains unclaimed by the owner will be remitted as unclaimed property on the date of final distribution. [I.C., § 14-511, as added by 1983, ch. 209, § 2, p. 563; am. 1989, ch. 99, § 1, p. 228.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-511 was repealed. See Prior Laws, § 14-501.

**14-512. Property held by agents and fiduciaries.** — (1) Intangible property and any income or increment derived therefrom held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner, within five (5) years after it has become payable or distributable, has increased or decreased the principal, accepted payment of principal or income, or communicated concerning the property.

(2) Amounts due and payable from property in an individual retirement account, defined benefit plan, or other account or plan that is qualified for tax deferral under the income tax laws of the United States, is presumed abandoned three (3) years after the earlier of the date of the required distribution as stated in the documents governing the account or plan, or the date, if determinable by the holder, specified in the income tax law of the United States by which distribution of the property must begin in order to avoid a tax penalty, but excluding property in any such account or plan if the documents governing the account or plan provide a method for the treatment of the account balance of an account holder or plan participant or beneficiary who cannot be located.

(3) For the purposes of this section, a person who holds property as an agent for a business association is deemed to hold the property in a fiduciary capacity for that business association alone, unless the agreement between him and the business association provides otherwise.

(4) For the purposes of this chapter, a person who is deemed to hold property in a fiduciary capacity for a business association alone is the holder of the property only insofar as the interest of the business association in the property is concerned, and the business association is the holder of the property insofar as the interest of any other person in the property is concerned. [I.C., § 14-512, as added by 1983, ch. 209, § 2, p. 563; am. 1997, ch. 399, § 6, p. 1262; am. 2002, ch. 152, § 3, p. 443.]

**14-513. Property held by courts and public agencies.** — (1) Intangible property held for the owner by a court, state or other government, governmental subdivision or agency, public corporation, or public authority which remains unclaimed by the owner for more than one (1) year after becoming payable or distributable is presumed abandoned.

(2) If witness and juror fees or mileage payments are not claimed by the owner within one (1) year of the date of issuance of a check or warrant, the fees or mileage payments shall remain the property of the county and shall be remitted to the district court fund. [I.C., § 14-513, as added by 1983, ch. 209, § 2, p. 563; am. 1992, ch. 38, § 1, p. 136.]

#### STATUTORY NOTES

**Cross References.** — District court fund, § 31-867.

**Prior Laws.** — Former § 14-513 was repealed. See Prior Laws, § 14-501.

#### OPINIONS OF ATTORNEY GENERAL

Section 26-1023 of the Bank Act, which deals with distribution of unclaimed property after the liquidation is completed, is not consistent with the Unclaimed Property Act. A transfer of the unclaimed property should be made to the state treasurer pursuant to § 26-

1023, and the treasurer then has a duty to comply with the Unclaimed Property Act by filing an unclaimed property report and transferring funds to the unclaimed property account. OAG 85-6.

**14-514. Gift certificates and credit memos.** — (1) A gift certificate without an expiration date prominently displayed on its face or a credit memo issued in the ordinary course of an issuer's business which remains unclaimed by the owner for more than five (5) years after becoming payable or distributable is presumed abandoned.

(2) In the case of a gift certificate without an expiration date prominently displayed on its face, the amount presumed abandoned is the price paid by the purchaser for the gift certificate. In the case of a credit memo, the amount presumed abandoned is the amount credited to the recipient of the memo. [I.C., § 14-514, as added by 1983, ch. 209, § 2, p. 563; am. 1997, ch. 399, § 7, p. 1262.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-514 was repealed. See Prior Laws, § 14-501.

**14-515. Wages.** — Unpaid wages, including wages represented by unpresented payroll checks, owing in the ordinary course of the holder's business which remain unclaimed by the owner for more than one (1) year after becoming payable are presumed abandoned. [I.C., § 14-515, as added by 1983, ch. 209, § 2, p. 563.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-515 was repealed. See Prior Laws, § 14-501.



**14-516. Contents of safe deposit box or other safekeeping repository.** — All tangible and intangible property held in a safe deposit box or any other safekeeping repository in this state in the ordinary course of the holder's business and proceeds resulting from the sale of the property permitted by other law, which remain unclaimed by the owner for more than five (5) years after the lease or rental period on the box or other repository has expired, are presumed abandoned. [I.C., § 14-516, as added by 1983, ch. 209, § 2, p. 563; am. 2002, ch. 152, § 4, p. 443.]

#### OPINIONS OF ATTORNEY GENERAL

This state, acting through the state tax commission, has authority to take possession of unclaimed property recovered from safe deposit boxes or other safekeeping repository

ries of national banks closed during the 1930's and before, which property is in the custody of the United States comptroller of the currency. OAG 83-10.

**14-517. Report of abandoned property.** — (1) A person holding property tangible or intangible, presumed abandoned and subject to custody as unclaimed property under this chapter shall report to the administrator concerning the property as provided in this section.

(2) The report must be verified and must include:

(a) Except with respect to traveler's checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of property presumed abandoned under this chapter;

(b) In the case of unclaimed funds of more than fifty dollars (\$50.00) held or owing under any life or endowment insurance policy or annuity contract, the full name and last known address of the insured or annuitant and of the beneficiary according to the records of the insurance company holding or owing the funds;

(c) In the case of the contents of a safe deposit box or other safekeeping repository or of other tangible property, a description of the property and the place where it is held and may be inspected by the administrator and any amounts owing to the holder;

(d) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due;

(e) The date the property became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property; and

(f) Other information the administrator prescribes by rule as necessary for the administration of the provisions of this chapter.

(3) If the person holding property presumed abandoned and subject to custody as unclaimed property is a successor to other persons who previously held the property for the apparent owner or the holder has changed his name while holding the property, he shall file with his report all known names and addresses of each previous holder of the property.

(4) The report must be filed no later than November 1 of each year as of June 30 next preceding. On written request by any person required to file a report, the administrator may postpone the reporting date.



(5) All holders of property presumed abandoned under this section that know the whereabouts of the owner of such property shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. Not more than one hundred twenty (120) days before filing the report required by this section, the holder in possession of property presumed abandoned and subject to custody as unclaimed property under this chapter shall send written notice to the apparent owner at his last known address informing him that the holder is in possession of property subject to this chapter if the holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate.

(6) The written notice required under this section shall include the name and address of the apparent owner, the nature and amount of the property presumed abandoned in the holder's possession, the name and address of the holder of the property presumed abandoned, a request that the apparent owner identify whether the property presumed abandoned is or is not unclaimed property under this chapter, and the reasons therefor, and any other criteria the administrator deems appropriate.

(7) If the apparent owner completes and returns the written notice described in subsection (6) of this section to the holder, and the apparent owner indicates a claim to the property presumed abandoned or indicates that the property identified in the written notice is not abandoned property, the holder need not pay or deliver the property to the administrator, and the property shall not be considered abandoned.

(8) In the event a holder receives a written notice as described in subsection (7) of this section demonstrating that certain property is not abandoned, a new presumption of abandonment may arise for such property due to the passage of time. The date the holder receives the written notice shall be deemed the date such property became payable or distributable for the purposes of calculating whether a presumption of abandonment has arisen.

(9) A report filed pursuant to this section shall be presumed accurate if the holder has maintained adequate records sufficient to establish by a preponderance of evidence that each item on the report is accurate and correct. [I.C., § 14-517, as added by 1983, ch. 209, § 2, p. 563; am. 1991, ch. 62, § 1, p. 153; am. 1997, ch. 399, § 8, p. 1262; am. 2002, ch. 152, § 5, p. 443; am. 2004, ch. 29, § 1, p. 49.]

#### STATUTORY NOTES

**Cross References.** — State tax commission, art. VII, § 12, Idaho Const. and § 63-101.

**Effective Dates.** — Section 3 of S.L. 1991, ch. 62 declared an emergency. Approved March 21, 1991.

#### OPINIONS OF ATTORNEY GENERAL

Section 26-1023 of the Bank Act, which deals with distribution of unclaimed property after the liquidation is completed is not consistent with the Unclaimed Property Act. A

transfer of the unclaimed property should be made to the state treasurer pursuant to § 26-1023, and the treasurer then has a duty to comply with the Unclaimed Property Act by

filing an unclaimed property report and transferring funds to the unclaimed property account. OAG 85-6.

**14-518. Notice and publication of lists of abandoned property. —**

(1) The administrator shall establish, maintain and update at least quarterly a current list of all reported owners of abandoned property on a website that is connected to or that may be accessed from the website maintained by the state tax commission. At least one (1) week before each quarterly website posting of such list, the administrator shall publish a notice in the official newspaper of each Idaho county stating when and where the quarterly website listing of Idaho abandoned property will be accessible to citizens. Provided however, the names and addresses of owners located in a state which will receive the accounts because of reciprocal agreements as permitted by section 14-535, Idaho Code, need not be listed.

(2) The list maintained by the administrator must contain:

(a) The names, in alphabetical order, of persons listed in any report of abandoned property filed with the administrator and entitled to notice;

(b) A statement that information concerning the property may be obtained by any person possessing an interest in the property by addressing an inquiry to the administrator;

(c) A statement that the property is in the custody of the administrator and all claims must be directed to the administrator; and

(d) A statement that the property shall escheat to the state of Idaho and become the property of the state of Idaho if not claimed within ten (10) years after it is received by the administrator.

(3) The administrator is not required to list any items of less than one hundred dollars (\$100) unless the administrator considers the inclusion of such property in the list to be in the public interest.

(4) This section is not applicable to sums payable on traveler's checks, money orders, and other written instruments presumed abandoned under section 14-504, Idaho Code. [I.C., § 14-518, as added by 1983, ch. 209, § 2, p. 563; am. 1987, ch. 10, § 1, p. 14; am. 1988, ch. 282, § 1, p. 915; am. 1991, ch. 62, § 2, p. 153; am. 1997, ch. 399, § 9, p. 1262; am. 2002, ch. 34, § 1, p. 65; am. 2004, ch. 29, § 2, p. 49; am. 2005, ch. 36, § 1, p. 156.]

**STATUTORY NOTES**

**Prior Laws.** — A former § 14-518 was repealed. See Prior Laws, § 14-501.

**Compiler's Notes.** — Section 2 of S.L. 1988, ch. 282 read: "The amendments to section 14-518, Idaho Code, effected by section 1

of this act, shall be repealed on and after January 1, 1991."

**Effective Dates.** — Section 3 of S.L. 1991, ch. 62 declared an emergency. Approved March 21, 1991.

**14-519. Payment or delivery of abandoned property. —** (1) Except as otherwise provided in this section, and subsection (2) of section 14-508, Idaho Code, a person who is required to file a report under section 14-517, Idaho Code, shall pay or deliver to the administrator all abandoned property together with the report required under section 14-517, Idaho Code.

(2) If the owner establishes the right to receive the abandoned property to the satisfaction of the holder before the property has been delivered or it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property to the administrator, and the property will no longer be presumed abandoned.

(3) The holder of an interest under section 14-510, Idaho Code, shall deliver a duplicate certificate or other evidence of ownership if the holder does not issue certificates of ownership to the administrator. Upon delivery of a duplicate certificate to the administrator, the holder and any transfer agent, registrar, or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate is relieved of all liability of every kind in accordance with the provisions of section 14-520, Idaho Code, to every person, including any person acquiring the original certificate or the duplicate of the certificate issued to the administrator, for any losses or damages resulting to any person by the issuance and delivery to the administrator of the duplicate certificate. [I.C., § 14-519, as added by 1983, ch. 209, § 2, p. 563; am. 1992, ch. 21, § 3, p. 67; am. 1997, ch. 399, § 10, p. 1262.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-519 was repealed. See Prior Laws, § 14-501.

#### OPINIONS OF ATTORNEY GENERAL

Section 26-1023 of the Bank Act, which deals with distribution of unclaimed property after the liquidation is completed is not consistent with the Unclaimed Property Act. A transfer of the unclaimed property should be made to the state treasurer pursuant to § 26-

1023, and the treasurer then has a duty to comply with the Unclaimed Property Act by filing an unclaimed property report and transferring funds to the unclaimed property account. OAG 85-6.

**14-520. Custody by state, holder relieved from liability — Reimbursement of holder paying claim — Reclaiming for owner — Defense of holder — Payment of safe deposit box or repository charges.** — (1) Upon the payment or delivery of property to the administrator, the state assumes custody and responsibility for the safekeeping of the property. A person who pays or delivers property to the administrator in good faith is relieved of all liability to the extent of the value of the property paid or delivered for any claim then existing or which thereafter may arise or be made in respect to the property.

(2) A holder who has paid money to the administrator pursuant to this chapter may make payment to any person appearing to the holder to be entitled to payment and, upon filing proof of payment and proof that the payee was entitled thereto, the administrator shall promptly reimburse the holder for the payment without imposing any fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a travelers check or money order, the holder must be reimbursed under this subsection upon filing proof that the instrument was duly presented and that payment was made to a person who appeared to the



holder to be entitled to payment. The holder must be reimbursed for payment made under this subsection even if the payment was made to a person whose claim was barred under section 14-529, Idaho Code.

(3) A holder who has delivered property, including a certificate of any interest in a business association, other than money to the administrator pursuant to this chapter may reclaim the property if still in the possession of the administrator, without paying any fee or other charge, upon filing proof that the owner has claimed the property from the holder.

(4) The administrator may accept the holder's affidavit as sufficient proof of the facts that entitle the holder to recover money and property under this section.

(5) If the holder pays or delivers property to the administrator in good faith and thereafter another person claims the property from the holder or another state claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the administrator, upon written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability on the claim.

(6) For the purposes of this section, "good faith" means that:

(a) Payment or delivery was made in a reasonable attempt to comply with the provisions of this chapter;

(b) The person delivering the property was not a fiduciary then in breach of trust in respect to the property and had a reasonable basis for believing, based on the facts then known to him, that the property was abandoned for the purposes of this chapter; and

(c) There is no showing that the records pursuant to which the delivery was made did not meet reasonable commercial standards of practice in the industry.

(7) Property removed from a safe deposit box or other safekeeping repository is received by the administrator subject to the holder's right under this subsection to be reimbursed for the actual cost of the opening and to any valid lien or contract providing for the holder to be reimbursed for unpaid rent or storage charges. The administrator shall reimburse or pay the holder out of the proceeds remaining after deducting the administrator's selling cost. [I.C., § 14-520, as added by 1983, ch. 209, § 2, p. 563.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-520 was repealed. See Prior Laws, § 14-501.

**14-521. Crediting of dividends, interest, or increments to owner's account.** — Whenever property other than money is paid or delivered to the administrator under this chapter, the owner is entitled to receive from the administrator any dividends, interest, or other increments realized or accruing on the property at or before liquidation or conversion thereof into money. [I.C., § 14-521, as added by 1983, ch. 209, § 2, p. 563.]



## STATUTORY NOTES

**Prior Laws.** — Former § 14-521 was repealed. See Prior Laws, § 14-501.

**14-522. Public sale of abandoned property.** — (1) The administrator, within three (3) years after the receipt of abandoned property, shall sell it to the highest bidder at public sale in whatever city affords in the judgment of the administrator, the most favorable market for the property involved. The administrator may decline the highest bid and reoffer the property for sale if in the judgment of the administrator, the bid is insufficient. If in the judgment of the administrator, the probable cost of sale exceeds the value of the property, it need not be offered for sale. Any sale held under this section must be preceded by a single publication of notice, at least three (3) weeks in advance of sale, in a newspaper of general circulation in the county in which the property is to be sold.

(2) Securities listed on an established stock exchange must be sold at prices prevailing at the time of sale on the exchange. Other securities may be sold over the counter at prices prevailing at the time of sale or by any other method the administrator considers advisable.

(3) A person making a claim under this chapter is entitled to receive either the securities delivered to the administrator by the holder, if they still remain in the hands of the administrator, or the proceeds received from the sale, less any amounts deducted pursuant to section 14-523(3), Idaho Code, but no person has any claim under this chapter against the state, the holder, any transfer agent, registrar, or other person acting for or on behalf of a holder for any appreciation in the value of the property occurring after delivery by the holder to the administrator.

(4) The purchaser of property at any sale conducted by the administrator pursuant to this chapter takes the property free of all claims of the owner or previous holder thereof and of all persons claiming through or under them. The administrator shall execute all documents necessary to complete the transfer of ownership. [I.C., § 14-522, as added by 1983, ch. 209, § 2, p. 563; am. 2007, ch. 97, § 2, p. 280.]

## STATUTORY NOTES

**Prior Laws.** — Former § 14-522 was repealed. See Prior Laws, § 14-501.

**Amendments.** — The 2007 amendment, by ch. 97, in subsection (2), substituted “sale on the exchange” for “sale of the exchange”;

and in subsection (3), substituted “to the administrator by the holder” for “to the administrator to the holder,” and updated the section reference.

**14-523. Disposition of money received.** — (1) All money received under this chapter, including the proceeds from the sale of property under section 14-522, Idaho Code, shall be deposited in the unclaimed property account.

(2) An amount equal to the funds received from unclaimed shares and dividends of any corporation incorporated under the laws of the state of Idaho shall be transferred from the unclaimed property account to the

public school permanent endowment fund created pursuant to section 4, article IX, of the constitution of the state of Idaho. In the event that any funds are required to refund any funds deposited in the public school permanent endowment fund under this section or under section 14-113 or 15-3-914, Idaho Code, the state tax commission shall offset the amount of such refund against future transfers to the public school permanent endowment fund. In the event that in one (1) fiscal year there are insufficient amounts to effect the offset, the balance shall be recaptured from the public school earnings reserve fund established under section 33-902A, Idaho Code.

(3) All other money in the unclaimed property account is hereby continuously appropriated to the state tax commission, without regard to fiscal years, for expenditure in accordance with law in carrying out and enforcing the provisions of this chapter, including, but not limited to, the following purposes:

- (a) For payment of claims allowed by the state tax commission under the provisions of this chapter.
- (b) For refund, to the person making such deposit of amounts, including overpayments, deposited in error in such account.
- (c) For payment of the cost of appraisals incurred by the state tax commission covering property held in the name of the account.
- (d) For payment of the cost incurred by the state tax commission for the purchase of lost instrument indemnity bonds, or for payment to the person entitled thereto, for any unpaid lawful charges or costs which arose from holding any specific property or any specific funds which were delivered or paid to the state tax commission, or which arose from complying with this chapter with respect to such property or funds.
- (e) For payment of amounts required to be paid by the state as trustee, bailee, or successor in interest to the preceding owner.
- (f) For payment of costs of official advertising in connection with the sale of property held in the name of the account.
- (g) For transfer to the general fund as provided in subsection (4) of this section.
- (h) For transfer to the inheritance tax account of the amount of any inheritance taxes determined to be due and payable to the state by any claimant with respect to any property claimed by him under the provisions of this chapter.

(4) At the end of each month, or more often, if it deems it advisable, the state tax commission shall transfer all money in the unclaimed property account in excess of two hundred fifty thousand dollars (\$250,000) to the general fund. Within sixty (60) days of making this transfer, it shall record the name and last known address, if available, of each person appearing from the holder's report to be entitled to the property. The record shall be available for public inspection at all reasonable business hours.

(5) All money received under this chapter, including the proceeds from the sale of property under section 14-522, Idaho Code, deposited in the general fund shall be retained by the state of Idaho for the purposes of this section and administered pursuant to this section for a period of ten (10)

years. At the end of such period, those moneys which have not been claimed and paid over or delivered as an allowed claim under this section and section 14-524, Idaho Code, shall become due and payable by escheat to the state of Idaho and become the property of the state of Idaho without further action on the part of the administrator. [I.C., § 14-523, as added by 1983, ch. 209, § 2, p. 563; am. 1994, ch. 124, § 2, p. 282; am. 1997, ch. 399, § 11, p. 1262; am. 2004, ch. 29, § 3, p. 49; am. 2007, ch. 97, § 3, p. 280.]

### STATUTORY NOTES

**Cross References.** — Public school permanent endowment fund, § 33-902.

State tax commission, art. VII, § 12, Idaho Const. and § 63-101.

**Prior Laws.** — Former § 14-523 was repealed. See Prior Laws, § 14-501.

**Amendments.** — The 2007 amendment,

by ch. 97, added subsection (2) and redesignated subsections accordingly; in the introductory paragraph in subsection (3), inserted “other” preceding “money”; and in subsections (3)(g), (4), and (5), substituted “general fund” for “general account.”

**14-524. Filing of claim with administrator.** — (1) A person, excluding another state, claiming an interest in any property paid or delivered to the administrator, may file a claim on a form prescribed by the administrator and verified by the claimant.

(2) The administrator shall consider each claim within ninety (90) days after it is filed and give written notice to the claimant if the claim is denied in whole or in part. The ninety (90) day time period may be extended by the claimant and the administrator upon their written agreement. The notice may be given by mailing it to the last address, if any, stated in the claim as the address to which notices are to be sent. If no address for notices is stated in the claim, the notice may be mailed to the last address, if any, of the claimant as stated in the claim. No notice of denial need be given if the claim fails to state either the last address to which notices are to be sent or the address of the claimant.

(3) If a claim is allowed, the administrator shall pay over or deliver to the claimant the property or the amount the administrator actually received or the net proceeds, if it has been sold by the administrator, together with any additional amount required by section 14-521, Idaho Code. If the property claimed was interest-bearing to the owner on the date of surrender by the holder, the administrator also shall pay interest at a rate of five percent (5%) a year or any lesser rate the property earned while in the possession of the holder. Interest begins to accrue when the property is delivered to the administrator and ceases on the earlier of the expiration of ten (10) years after delivery or the date on which payment is made to the owner.

(4) Any holder who pays the owner for property that has been delivered to the state and which, if claimed from the administrator, would be subject to the provisions of subsection (3) of this section, shall add interest as provided in subsection (3). The added interest must be repaid to the holder by the administrator in the same manner as the principal.

(5) A person claiming an abandoned utility deposit under section 14-508(1), Idaho Code, who is entitled thereto under this section, which was not deposited with the administrator under section 14-508(2), Idaho Code, may



file a claim on a form prescribed by the administrator and verified by the claimant. The administrator will forward the claim to the utility company, who shall remit such payment to the claimant upon receipt of the claim. [I.C., § 14-524, as added by 1983, ch. 209, § 2, p. 563; am. 1997, ch. 399, § 12, p. 1262; am. 2003, ch. 11, § 1, p. 28.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-524 was repealed. See Prior Laws, § 14-501.

#### **14-525. Claim of another state to recover property — Procedure.**

— (1) At any time after property has been paid or delivered to the administrator under this chapter, another state may recover the property if:

(a) The property was subjected to custody by this state because the records of the holder did not reflect the last known address of the apparent owner when the property was presumed abandoned under this chapter, and the other state establishes that the last known address of the apparent owner or other person entitled to the property was in that state and under the laws of that state, the property escheated to or was subject to a claim of abandonment by that state;

(b) The last known address of the apparent owner or other person entitled to the property, as reflected by the records of the holder, is in the other state and under the laws of that state the property has escheated to or become subject to a claim of abandonment by that state;

(c) The records of the holder were erroneous in that they did not accurately reflect the actual owner of the property and the last known address of the actual owner is in the other state and under the laws of that state the property escheated to or was subject to a claim of abandonment by that state;

(d) The property was subjected to custody by this state under section 14-503(b) [14-503(6)], Idaho Code, and under the laws of the state of domicile of the holder the property has escheated to or become subject to a claim of abandonment by that state; or

(e) The property is the sum payable on a travelers check, money order, or other similar instrument that was subjected to custody by this state under section 14-504, Idaho Code, and the instrument was purchased in the other state, and under the laws of that state the property escheated to or became subject to a claim of abandonment by that state.

(2) The claim of another state to recover escheated or abandoned property must be presented in a form prescribed by the administrator, who shall decide the claim within ninety (90) days after it is presented. The administrator shall allow the claim if he determines that the other state is entitled to the abandoned property under subsection (1) of this section.

(3) The administrator shall require a state, before recovering property under this section, to agree to indemnify this state and its officers and employees against any liability on a claim for the property. [I.C., § 14-525, as added by 1983, ch. 209, § 2, p. 563.]



## STATUTORY NOTES

**Prior Laws.** — Former § 14-525 was repealed. See Prior Laws, § 14-501.

**Compiler's Notes.** — The reference in subdivision (1)(d) of this section to § 14-503(b) should probably be to § 14-503(6), as there is no § 14-503(b).

**14-526. Action to establish claim.** — A person aggrieved by a denial of a claim by the administrator or whose claim has not been acted upon within the time provided in subsection (2) of section 14-524, Idaho Code, may obtain a redetermination as provided in section 63-3045, Idaho Code, by filing a written protest with the administrator within sixty-three (63) days after the denial was mailed or after the time period for issuing the denial has lapsed. Judicial review of any redetermination shall be as provided in section 63-3049, Idaho Code. [I.C., § 14-526, as added by 1983, ch. 209, § 2, p. 563; am. 2003, ch. 11, § 2, p. 28.]

## STATUTORY NOTES

**Prior Laws.** — Former § 14-526 was repealed. See Prior Laws, § 14-501.

**14-527. Election to take payment or delivery.** — (1) The administrator may decline to receive any property reported under the provisions of this chapter which it considers to have a value less than the expense of giving notice and of sale. If the administrator elects not to receive custody of the property, the holder shall be notified within one hundred twenty (120) days after filing the report required under section 14-517, Idaho Code.

(2) A holder, with the written consent of the administrator and upon conditions and terms prescribed by him, may report and deliver property before the property is presumed abandoned. Property delivered under this subsection must be held by the administrator and is not presumed abandoned until such time as it otherwise would be presumed abandoned under this chapter. [I.C., § 14-527, as added by 1983, ch. 209, § 2, p. 563.]

## STATUTORY NOTES

**Prior Laws.** — Former § 14-527 was repealed. See Prior Laws, § 14-501.

**14-528. Destruction or disposition of property having insubstantial commercial value — Immunity from liability.** — If the administrator determines after investigation that any delivered property has insubstantial commercial value, the administrator may destroy or otherwise dispose of the property at any time. No action or proceeding may be maintained against the state or any officer or against the holder for or on account of any action taken by the administrator pursuant to this section. [I.C., § 14-528, as added by 1983, ch. 209, § 2, p. 563.]

## STATUTORY NOTES

**Prior Laws.** — Former § 14-528 was repealed. See Prior Laws, § 14-501.

**14-529. Periods of limitation.** — (1) The expiration, before or after the effective date of this act, of any period of time specified by contract, statute, or court order, during which a claim for money or property can be made or during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or to recover property, does not prevent the money or property from being presumed abandoned or affect any duty to file a report or to pay or deliver abandoned property to the administrator as required in this chapter except as provided in subsection (2) of this section.

(2) Where a holder has filed a report as required by section 14-517, Idaho Code, the administrator may commence any action or proceeding with respect to any duty of a holder to report and deliver unclaimed property under this act within three (3) years after the time for the filing of a report concerning the property as required by section 14-517, Idaho Code.

(3) Where a holder violates section 14-517, Idaho Code, by failing to file a report, the administrator may commence any action or proceeding with respect to any duty of a holder to report and deliver unclaimed property under this act within seven (7) years after the time for the filing of a report concerning the property as required by section 14-517, Idaho Code. [I.C., § 14-529, as added by 1983, ch. 209, § 2, p. 563; am. 1992, ch. 21, § 4, p. 67; am. 1997, ch. 399, § 13, p. 1262.]

## STATUTORY NOTES

**Prior Laws.** — Former § 14-529 was repealed. See Prior Laws, § 14-501.

**Compiler's Notes.** — The phrase "effective date of this act", in subsection (1), refers to the effective date of S.L. 1983, ch. 209, which was July 1, 1983.

The term "this act", as used in subsection (2), was added by S.L. 1992, ch. 21, which is codified as §§ 14-502, 14-510, 14-519, 14-529, 14-533, and 15-3-914. Presumably the refer-

ence should be to "this chapter", meaning chapter 5 of title 14, Idaho Code.

The term "this act", as used in subsection (3), was added by S.L. 1997, ch. 399, which is codified as §§ 14-501, 14-502, 14-504, 14-508, 14-512, 14-514, 14-517 to 14-519, 14-523, 14-524, 14-529 to 14-531, 14-533, and 14-543. Presumably, the reference should be to "this chapter", meaning chapter 5 of title 14, Idaho Code.

**14-530. Requests for reports and examination of records.** — (1) The administrator may require any person who has not filed a report to file a verified report stating whether or not the person is holding any unclaimed property reportable or deliverable under this chapter.

(2) The administrator, at reasonable times and upon reasonable notice, may examine the records of any person to determine whether the person has complied with the provisions of this chapter. The administrator may conduct the examination even if the person believes it is not in possession of any property reportable or deliverable under the provisions of this chapter.

(3) If a person is treated under section 14-512, Idaho Code, as the holder of the property only insofar as the interest of the business association in the property is concerned, the administrator, pursuant to subsection (2) of this

section, may examine the records of the person if the administrator has given the notice required by subsection (2) to both the person and the business association at least ninety (90) days before the examination.

(4) If a holder fails to maintain the records required by section 14-531, Idaho Code, and the records of the holder available for the periods subject to this chapter and [are] insufficient to permit the preparation of a report, the administrator may require the holder to report and pay such amounts as may reasonably be estimated from any available records. [I.C., § 14-530, as added by 1983, ch. 209, § 2, p. 563; am. 1997, ch. 399, § 14, p. 1262.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-530 was repealed. See Prior Laws, § 14-501.

tion in subsection (4) was added by the compiler as the seemingly intended word.

**Compiler's Notes.** — The bracketed inser-

**14-531. Retention of records.** — (1) Every holder of unclaimed property under this chapter as to any property for which it has obtained the last known address of the owner, shall maintain a record of the name and last known address of the owner for seven (7) years after the year in which the property becomes unclaimed, except to the extent that a shorter time as [is] provided in subsection (2) of this section or by rule of the administrator.

(2) Any business association that sells in this state its travelers checks, money orders, or other similar written instruments, other than third-party bank checks on which the business association is directly liable, or that provides such instruments to others for sale in this state, shall maintain a record of those instruments while they remain outstanding, indicating the state and date of issue for three (3) years after the year in which the property becomes unclaimed. [I.C., § 14-531, as added by 1983, ch. 209, § 2, p. 563; am. 1997, ch. 399, § 15, p. 1262.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 14-531 was repealed. See Prior Laws, § 14-501.

tion in subsection (1) was added by the compiler as the seemingly intended word.

**Compiler's Notes.** — The bracketed inser-

**14-532. Enforcement — Actions to enforce unclaimed property law.** — The collection and enforcement procedures provided by the Idaho income tax act, sections 63-3038, 63-3039, and 63-3042 through 63-3065A, Idaho Code, but excluding subsection (6) of section 63-3045, Idaho Code, shall apply and be available to the state tax commission for enforcement of the provisions of this chapter and collection of any property required to be transferred shall be treated in the same manner as taxes due the state of Idaho, and wherever liens or any other proceedings are defined as income tax liens or proceedings, they shall, when applied in enforcement of this chapter, be described as unclaimed property liens and proceedings. [I.C., § 14-532, as added by 1983, ch. 209, § 2, p. 563; am. 2008, ch. 11, § 1, p. 16.]



## STATUTORY NOTES

**Cross References.** — State tax commission, art. VII, § 12, Idaho Const. and § 63-101.

**Prior Laws.** — Former § 14-532 was re-

pealed. See Prior Laws, § 14-501.

**Amendments.** — The 2008 amendment, by ch. 11, inserted “but excluding subsection (6) of section 63-3045, Idaho Code.”

**14-533. Interest and penalties.** — (1) Upon the administrator’s showing by a preponderance of evidence that a holder has failed to pay or deliver property within the time prescribed in this chapter[, the holder] shall pay to the administrator interest at the annual rate of twelve percent (12%) on the property or value thereof from the date the property should have been paid or delivered until actual delivery is made.

(2) Upon the administrator’s showing by a preponderance of evidence that a holder has negligently failed to pay or deliver property within the time prescribed in this chapter[, the holder] shall pay to the administrator a penalty at the annual rate of five percent (5%) on the property or value thereof from the date the property should have been paid or delivered until actual delivery is made unless the holder demonstrates to the satisfaction of the administrator that the failure was due to reasonable cause and not neglect.

(3) A holder who willfully refuses after written demand by the administrator to pay or deliver property as required under this chapter shall be guilty of a misdemeanor and upon conviction may be punished by a fine of not less than three hundred dollars (\$300) nor by more than three thousand dollars (\$3,000). [I.C., § 14-533, as added by 1992, ch. 21, § 6, p. 67; am. 1997, ch. 399, § 16, p. 1262.]

## STATUTORY NOTES

**Prior Laws.** — Former § 14-533, which comprised I.C. § 14-533, as added by 1983, ch. 209, § 2, p. 563, was repealed by S.L. 1992, ch. 21, § 5.

Another former § 14-533 was repealed. See Prior Laws, § 14-501.

**Compiler’s Notes.** — The bracketed insertions in subsections (1) and (2) were added by the compiler for clarity.

**Effective Dates.** — Section 9 of S.L. 1992, ch. 21 declared an emergency. Approved March 9, 1992.

**14-534. State historical society use of property.** — The director of the state historical society may examine any tangible personal property delivered to the state tax commission under this chapter for purposes of determining whether such property is of sufficient historical value that it should be preserved. If he so determines, the state tax commission may deliver such property to the state historical society for preservation and display, until such time as the owner shall make claim for return of such property. [I.C., § 14-534, as added by 1983, ch. 209, § 2, p. 563.]

## STATUTORY NOTES

**Cross References.** — State historical society, § 67-4113, et seq.

State tax commission, art. VII, § 12, Idaho Const. and § 63-101.

**Prior Laws.** — Former § 14-534 was repealed. See Prior Laws, § 14-501.



**14-535. Interstate agreements and cooperation — Joint and reciprocal actions with other states.** — (1) The administrator may enter into agreements with other states to exchange information needed to enable this or another state to audit or otherwise determine unclaimed property that it or another state may be entitled to subject to a claim of custody. The administrator by rule may require the reporting of information needed to enable compliance with agreements made pursuant to this section and prescribe the form for reporting.

(2) To avoid conflicts between the administrator's procedures and the procedures of administrators in other jurisdictions that enact the uniform unclaimed property act, the administrator, so far as is consistent with the purposes, policies, and provisions of this chapter, before adopting, amending or repealing rules, shall advise and consult with administrators in other jurisdictions that enact substantially the uniform unclaimed property act and take into consideration the rules of administrators in other jurisdictions that enact the uniform unclaimed property act.

(3) The administrator may join with other states to seek enforcement of this act against any person who is or may be holding reportable property.

(4) At the request of another state, the attorney general of this state may bring an action in the name of the administrator of the other state in any court of competent jurisdiction to enforce the unclaimed property laws of the other state against a holder in this state of property subject to escheat or a claim of abandonment by the other state, if the other state has agreed to pay expenses incurred by the attorney general in bringing the action.

(5) The administrator may request that the attorney general of another state or any other person bring an action in the name of the administrator in the other state. This state shall pay all expenses including attorney's fees in any action under this subsection. The administrator may agree to pay the person bringing the action attorney's fees based in whole or in part on a percentage of the value of any property recovered in the action. Any expenses paid pursuant to this subsection may not be deducted from the amount that is subject to the claim by the owner under this chapter. [I.C., § 14-535, as added by 1983, ch. 209, § 2, p. 563.]

#### STATUTORY NOTES

**Cross References.** — Attorney general, § 67-1401 et seq.

**Prior Laws.** — Former § 14-535 was repealed. See Prior Laws, § 14-501.

**Compiler's Notes.** — The term "this act",

as used in subsection (3), refers to S.L. 1983, ch. 209, which is codified as §§ 14-501, 14-502 to 14-532, 14-534 to 14-537, and 14-539 to 14-541.

**14-536. Agreement to locate reported property.** — All agreements to pay compensation to recover or assist in the recovery of property reported under section 14-517, Idaho Code, made within twenty-four (24) months after the date payment or delivery is made under section 14-519, Idaho Code, are unenforceable. [I.C., § 14-536, as added by 1983, ch. 209, § 2, p. 563.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-536 was repealed. See Prior Laws, § 14-501.

**14-537. Foreign transactions.** — This chapter does not apply to any property held, due and owing in a foreign country and arising out of a foreign transaction. [I.C., § 14-537, as added by 1983, ch. 209, § 2, p. 563.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-537 was repealed. See Prior Laws, § 14-501.

**14-538. Effect of new provisions — Clarification of application.**  
[Repealed.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-538 was repealed. See Prior Laws, § 14-501.

**Compiler's Notes.** — This section which comprised I.C., § 14-538, as added by 1983, ch. 209, § 2, p. 563 was repealed by S.L. 1997, ch. 399, § 17, effective July 1, 1997.

**14-539. Rules.** — The administrator may adopt necessary rules to carry out the provisions of this chapter. [I.C., § 14-539, as added by 1983, ch. 209, § 2, p. 563.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-539 was repealed. See Prior Laws, § 14-501.

**14-540. Uniformity of application and construction.** — This act shall be applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it. [I.C., § 14-540, as added by 1983, ch. 209, § 2, p. 563.]

### STATUTORY NOTES

**Prior Laws.** — Former § 14-540 was repealed. See Prior Laws, § 14-501.

**Compiler's Notes.** — The words "this act"

refer to S.L. 1983, ch. 209, which is compiled as §§ 14-501, 14-502 to 14-532, 14-534 to 14-537, and 14-539 to 14-541.

**14-541. Short title.** — This chapter may be cited as the "Uniform Unclaimed Property Act." [I.C., § 14-541, as added by 1983, ch. 209, § 2, p. 563.]

### STATUTORY NOTES

**Prior Laws.** — Former § 15-541 was repealed. See Prior Laws, § 14-501.

**Compiler's Notes.** — Section 3 of S.L. 1983, ch. 209 read: "The provisions of this act are hereby declared to be severable and if any

provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

**14-542. Exemption.** — (1) Counties holding a certificate of exemption from the administrator shall not be subject to the provisions of this chapter.

A certificate of exemption shall be provided to a county on the following basis:

- (a) The commissioners of such county file an election in writing with the administrator; and
- (b) The county assumes the responsibilities of the administrator under this chapter to locate unclaimed property in county hands, and refund the same to its rightful owner, according to the provisions of this chapter; and
- (c) The county establishes a revolving fund to pay claimants, and retains in said fund, an amount equal to twenty-five percent (25%) of the accumulated unclaimed property or twenty thousand dollars (\$20,000), whichever is less. Excess money in the revolving fund may be transferred to the county current expense fund; and
- (d) The county provides the administrator with the information required in the reports of abandoned property, to enable the administrator to maintain a complete central registry of all unclaimed property in the state.

In the event of revocation of the election or the administrator determines that the county has not complied with the requirements or exemption, the county's exemption shall terminate and the county shall transfer all unclaimed property and unclaimed property records to the administrator.

(2) A nonprofit corporation engaged in providing telecommunications service or the transmission, distribution or delivery of electric power shall not be subject to the provisions of this chapter relative to the distribution (retirement) of capital credits to members of such nonprofit corporation after July 1, 1982. For the purposes of this section, a capital credit is defined as an amount paid by a member for telecommunication or electric service in excess of the costs and expenses incurred by a nonprofit corporation in furnishing the service which is credited to the member's capital account by the nonprofit corporation. For capital credits distributed by the board of directors of such a nonprofit corporation that are not claimed by their member-owners, the nonprofit corporation distributing capital credits shall assume the responsibilities of the administrator under this chapter relative to notice, publication of unclaimed property lists, and refunds to rightful member-owners. Such nonprofit corporations who distribute capital credits shall establish a revolving fund to pay member-owners such capital credits and shall at all times maintain in said fund an amount equal to twenty-five percent (25%) of the accumulated capital credits presumed abandoned by the board of directors of said nonprofit corporations or twenty thousand dollars (\$20,000), whichever is less. Moneys in said fund in excess of the amount required to be maintained shall be transferred to the general account of said nonprofit corporations to be used for any purpose for which said corporation is incorporated. [I.C., § 14-542, as added by 1987, ch. 115, § 1, p. 228; am. 1989, ch. 287, § 1, p. 712; am. 1991, ch. 174, § 1, p. 425.]



## STATUTORY NOTES

**Prior Laws.** — Former § 14-542 which comprised I.C., § 14-542, as added by 1980, ch. 281, § 2, p. 730, was repealed by S.L. 1983, ch. 290, § 1.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**14-543. Successors' liability.** — (1) If any holder possessing unclaimed property under this act sells out its business or stock of goods, the purchaser of the business or stock of goods shall make inquiry of the administrator and withhold from the purchase price any amount of unclaimed property that may be due under this chapter until such time as the administrator provides written notification stating that no amount is due.

(2) If the purchaser of a business or stock of goods fails to withhold the amounts required by subsection (1) of this section from the purchase price, he becomes personally liable for the payment of the amount required to be withheld to the extent of the purchase price valued in money.

(3) The administrator shall, as soon as practicable after receiving written inquiry as to any amounts due, and no later than thirty (30) days after receipt of the inquiry or, if necessary, thirty (30) days from the date the holder's records are made available for review under section 14-530, Idaho Code, but in any event no later than sixty (60) days after receiving the inquiry, issue a statement to the purchaser setting forth the amount due under this chapter by the holder, if any. The administrator's failure to issue such statement will release the purchaser from any obligation to withhold from the purchase price the amounts as above required, or responsibility for the reporting or delivery of any unclaimed property due and owing by the holder under section 14-517, Idaho Code, and section 14-519, Idaho Code. [I.C., § 14-543, as added by 1997, ch. 399, § 18, p. 1262; am. 2004, ch. 29, § 4, p. 49.]

## STATUTORY NOTES

**Compiler's Notes.** — The term "this act", as used in subsection (1), was added by S.L. 1997, ch. 399, which is codified as §§ 14-501, 14-502, 14-504, 14-508, 14-512, 14-514, 14-517 to 14-519, 14-523, 14-524, 14-529 to 14-531, 14-533, and 14-543. Presumably, the reference should be to "this chapter", meaning chapter 5 of title 14, Idaho Code.

Section 19 of S.L. 1997, ch. 399 read: "This act shall be in full force and effect on and after its passage and approval, and shall be effective July 1, 1997, except that this act shall

have retroactive application to January 1, 1981, for the purposes of any audits or similar adjustments proposed by the administrator to ascertain compliance with the provisions of chapter 5, title 14, Idaho Code, in effect from January 1, 1981, to July 1, 1997. No person who has paid unclaimed property to the administrator between January 1, 1981, and July 1, 1997, shall have any right or claim to a refund or repayment of such unclaimed property or the value thereof solely because of the limited retroactive application of this act."





# TITLE 15

## UNIFORM PROBATE CODE

### CHAPTER.

1. GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT, §§ 15-1-101 — 15-1-403.
2. INTESTATE SUCCESSION — WILLS, §§ 15-2-101 — 15-2-1001.
3. PROBATE OF WILLS AND ADMINISTRATION, §§ 15-3-101 — 15-3-1314.
4. FOREIGN PERSONAL REPRESENTATIVES ANCILLARY ADMINISTRATION, §§ 15-4-101 — 15-4-401.
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### CHAPTER.

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9. FOREIGN GUARDIANSHIPS AND CONSERVATORSHIPS, §§ 15-9-101 — 15-9-206.
10. TRANSFERS OF GUARDIANSHIPS AND CONSERVATORSHIPS TO A FOREIGN JURISDICTION, §§ 15-10-101 — 15-10-205.
11. TEMPORARY RECOGNITION OF FOREIGN GUARDIANSHIPS AND CONSERVATORSHIPS, §§ 15-11-101 — 15-11-203.
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## CHAPTER 1

### GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT

#### PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

##### SECTION.

- 15-1-101. Short title.
- 15-1-102. Purposes — Rule of construction.
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#### PART 2. DEFINITIONS

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- 15-1-301. Territorial application.
- 15-1-302. [Reserved.]

##### SECTION.

- 15-1-303. Venue — Multiple proceedings — Transfer.
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- 15-1-305. Records and certified copies.
- 15-1-305A. Recording permitted — Effect.
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- 15-1-307. Registrar — Powers.
- 15-1-308, 15-1-309. [Reserved.]
- 15-1-310. Oath or affirmation on filed documents.
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#### PART 4. NOTICE, PARTIES AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

- 15-1-401. Notice — Method and time of giving.
- 15-1-402. Notice — Waiver.
- 15-1-403. Pleadings — When parties bound by others — Notice.

## PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

**15-1-101. Short title.** — This act shall be known and may be cited as the uniform probate code. [I.C., § 15-1-101, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Prior Laws.** — The provisions of former Title 15 were repealed or transferred by S.L. 1971, ch. 111, §§ 5 and 6 which read:

“SECTION 5. That Chapters 1 through 15 and Chapters 17 through 22, Title 15, Idaho Code, be, and the same are hereby repealed.

“SECTION 6. Chapter 16, Title 15, Idaho Code, shall be and is hereby designated from the time of the effective date of this act as Chapter 1, Title 14, Idaho Code.”

**Compiler's Notes.** — As enacted by S.L. 1971, ch. 111 the Uniform Probate Code was divided into Articles and Chapters. In order to compile this law so as to make it compatible with the remainder of the Idaho Code the compiler, with the approval of the Idaho Code Commission, has changed the designation of “Article” to “Chapter” and has changed the designation “Chapter” to “Part.”

The introductory clause of S.L. 1971, ch. 111, § 1 reads: “The comprehensive recodification of the law of wills, decedents’ estates, trusts, guardianships, and non-probate transfers is enacted as follows:”

The words “this act” refer to S.L. 1971, ch. 111, which is compiled as §§ 6-542, 6-543, 14-101 to 14-119, and in many places in Title 15. Presumably, the reference should be to those provisions in Title 15, Idaho Code, that were enacted by S.L. 1971, ch. 111, being chapters 1 through 7.

Section 28 of S.L. 1971, ch. 111, as amended by section 2 of S.L. 1971, ch. 126, and as amended by section 26 of S.L. 1972, ch. 201, provided that, **“Time of taking effect — Provisions for transition.** — (a) This code shall be in full force and effect on and after July 1, 1972.

“(b) Except as provided elsewhere in this code, on the effective date of this code:

“(1) the code applies to any wills of decedents dying thereafter;

“(2) the code applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code;

“(3) every personal representative including a person administering an estate or having been judicially assigned custody of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has the powers conferred by this code and is subject to the duties imposed with respect to any act occurring or done thereafter;

“(4) an act done before the effective date in any proceeding and any accrued right is not impaired by this code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right;

“(5) any rule of construction or presumption provided in this code applies to instruments executed and multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent.”

**Comparable Provisions.** — **Mont.** Rev. Codes Ann. § 72-1-101 et seq.

**Utah** Code Ann. § 75-1-101 et seq.

## JUDICIAL DECISIONS

**Cited in:** *Harrigfeld v. District Court of Seventh Judicial Dist.*, 95 Idaho 540, 511 P.2d 822 (1973); *In re Reichert*, 95 Idaho 647, 516

P.2d 704 (1973); *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

**15-1-102. Purposes — Rule of construction.** — (a) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this code are:

- (1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;
- (2) to discover and make effective the intent of a decedent in distribution of his property;
- (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;
- (4) to facilitate use and enforcement of certain trusts;



(5) to make uniform the law among the various jurisdictions. [I.C., § 15-1-102, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 1, p. 319.]

### JUDICIAL DECISIONS

#### Heirs.

The right of children to bring wrongful death actions before the adoption in 1971 of the Uniform Probate Code was based on their right to succeed to the decedent's estate under the laws of intestate succession in effect as of the date of death. The legislature, in enacting the Uniform Probate Code, intended that the wrongful death statute be applied in the same manner as it always had been, that is "heirs"

would be determined by reference to the intestate succession provision in effect at the time of death. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 747 P.2d 18 (1987).

**Cited in:** *Kunzler v. First Interstate Bank*, 108 Idaho 374, 699 P.2d 1388 (1985); *State, Dept. of Health & Welfare v. Estate of Elliott* (In re Estate of Elliott), 141 Idaho 177, 108 P.3d 324 (2005).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 131.

79 Am. Jur. 2d, Wills, § 758.

**C.J.S.** — 95 C.J.S., Wills, § 447 et seq.

**15-1-103. Supplementary general principles of law applicable.** — Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions. [I.C., § 15-1-103, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### Application of Case Law.

The question of whether an estate may be reopened for failure of the personal representative of an estate to notify the heirs and devisees upon his application for informal appointment or to notify all interested persons that he had applied to formally close the estate was not specifically treated in the probate code. However, Idaho case law, which

would apply under this section, recognizes that equity may treat allegations of lack of notice or failure to disclose relevant information as constituting fraud upon the court or the unnotified party and, accordingly, an action seeking "appropriate action against the perpetrator of the fraud" was available under § 15-1-106. *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 131, 1159.

**15-1-104. Severability.** — If any provision of this code or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable. [I.C., § 15-1-104, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 131.

**15-1-105. Construction against implied repeal.** — This code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided. [I.C., § 15-1-105, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 131.

**15-1-106. Effect of fraud and evasion.** — Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this code or if fraud is used to avoid or circumvent the provisions or purposes of this code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not. Any proceeding must be commenced within two (2) years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five (5) years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate. [I.C., § 15-1-106, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 2, p. 319.]

### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

### JUDICIAL DECISIONS

#### ANALYSIS

Fraud upon the court.  
Timeliness of action.

#### **Fraud Upon the Court.**

The question of whether an estate may be reopened for failure of the personal representative of an estate to notify the heirs and devisees upon his application for informal appointment or to notify all interested persons that he had applied to formally close the estate was not specifically treated in the probate code. However, Idaho case law, which would apply under § 15-1-103, recognizes that equity may treat allegations of lack of notice or failure to disclose relevant information as constituting fraud upon the court or the unnotified party and, accordingly, an action seeking "appropriate action against the

perpetrator of the fraud" was available under this section. *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

#### **Timeliness of Action.**

Where the final accounting and distribution of an estate occurred in November 1975, an action commenced in May 1976 which alleged fraud by the personal representatives was timely filed, even though actual prosecution of the action did not take place until 1978, since the commencement of the action in 1976 was within the two year limitation period contained in this section. *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 6, 13.

79 Am. Jur. 2d, Wills, § 394 et seq.

79 Am. Jur. 2d, Wills, § 772.

**C.J.S.** — 94 C.J.S., Wills, § 342 et seq.

## COMMENT TO OFFICIAL TEXT

This is an overriding provision that provides an exception to the procedures and limitations provided in the Code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section. Or if a will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three year period (section 3-108) has elapsed, there still may be an action under this section. Similarly, a closing statement normally provides binding protection for the personal representative after six months from the filing (section 3-1005). However, if there is fraudulent misrepresentation or concealment in the preparation of the claim, a later suit may be brought under this section against the personal representative for damages; or restitution may be obtained from those distributees who benefit by the fraud. In any case innocent purchasers for value are protected.

Any action under this section is subject to usual rules or *res judicata*; thus, if a forged

will has been informally probated, an heir discovers the forgery, and then there is a formal proceeding under section 3-1001 of which the heir is given notice, followed by an order of complete settlement of the estate, the heir could not bring a subsequent action under section 1-106 but would be bound by the litigation in which the issue could have been raised. The usual rules for securing relief for fraud on a court would govern, however.

The final limitation in this section is designed to protect innocent distributees after a reasonable period of time. There is no limit (other than the 2 years from discovery of the fraud) against the wrongdoer. But there ought to be some limit after which innocent persons who have built up expectations in good faith cannot be deprived of the property by a restitution action.

The time of "discovery" of a fraud is a fact question to be determined in the individual case. In some situations persons may not actually know that a fraud has been perpetrated but have such strong suspicion and evidence that a court may conclude there has been a discovery of the fraud at that stage. On the other hand there is no duty to exercise reasonable care to discover fraud; the burden should not be on the heirs and devisees to check on the honesty of the other interested persons or the fiduciary.

**15-1-107. Evidence as to death or status.** — In proceedings under this code the rules of evidence in courts of general jurisdiction including any relating to simultaneous deaths, are applicable unless specifically displaced by this code. In addition, the following rules relating to determination of death and status are applicable:

(a) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is *prima facie* proof of the fact, place, date and time of death and the identity of the decedent;

(b) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is *prima facie* evidence of the status and of the dates, circumstances and places disclosed by the record or report;

(c) A person who is absent for a continuous period of five (5) years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is



sufficient evidence for determining that death occurred earlier. [I.C., § 15-1-107, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Appointment of conservator in protective proceedings, § 15-5-401.

Simultaneous deaths, § 15-2-613.

### JUDICIAL DECISIONS

#### **Proof of Loss.**

The information furnished in the "Statement of Disappearance" deemed sufficient at trial to establish a prima facie case for declaring the beneficiary's husband dead was suffi-

cient to constitute proof of loss under § 41-1839. *Thomas v. John Hancock Mut. Life Ins. Co.*, 113 Idaho 98, 741 P.2d 734 (Ct. App. 1987).

### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 113.

**C.J.S.** — 95 C.J.S., Wills, § 625 et seq.

### COMMENT TO OFFICIAL TEXT

Subsection (3) [subsection (c) in the above section] is inconsistent with Section 1 of Uniform Absence as Evidence of Death and Absentees' Property Act (1938).

Proceedings to secure protection of property interests of an absent person may be com-

menced as provided in 5-401 [§ 15-5-401, Idaho Code].

The preliminary paragraph is designed to accommodate the Uniform Simultaneous Death Act, if it is a part of a state's law.

**15-1-108. Acts by holder of general power.** — For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all coholders of a presently exercisable general power of appointment, including one (1) in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power. [I.C., § 15-1-108, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

### COMMENT TO OFFICIAL TEXT

The status of a holder of a general power in estate litigation is dealt with by section 1-403 [§ 15-1-403, Idaho Code].

This section permits the settlor of a revoca-

ble trust to excuse the trustee from registering the trust so long as the power of revocation continues.

"General power," as used in this section, is

intended to refer to the common law concept, rather than to tax or other statutory meanings.

A general power, as used herein, is one which enables the power holder to draw absolute ownership to himself.

**15-1-109. Satisfaction of pecuniary devises or transfers by distribution in kind.** — (1) Whenever a personal representative or a trustee satisfies a pecuniary devise or transfer in trust by a distribution in kind with assets at their value for federal estate tax purposes, such fiduciary, in order to implement such a devise or transfer in trust, must, unless the governing instrument provides otherwise, distribute assets, including cash, fairly representative of appreciation or depreciation in all of the property so available for distribution in satisfaction of such pecuniary devise or transfer.

[(2)](b) Subsection (1) of this section is not intended to imply that the present law of this state, relating to selection of assets by fiduciaries in the circumstances herein described, has been otherwise than as set forth herein, but is a statement of the fiduciary principles applicable to such fiduciaries. [I.C., § 15-1-109, as added by 1999, ch. 306, § 1, p. 763.]

#### STATUTORY NOTES

**Compiler's Notes.** — The bracketed (2) was inserted by the compiler to complement the designation of subsection (1).

#### PART 2. DEFINITIONS

**15-1-201. General definitions.** — Subject to additional definitions contained in the subsequent chapters which are applicable to specific chapters or parts, and unless the context otherwise requires, in this code:

(1) "Application" means a written request to the registrar for an order of informal probate or appointment under part 3 of chapter 3 of this code.

(2) "Augmented estate" means the estate described in section 15-2-202, Idaho Code.

(3) "Beneficiary," as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and as it relates to a charitable trust, includes any person entitled to enforce the trust.

(4) "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant.

(5) "Claims," in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, other tax obligations arising from activities or transactions of the estate, demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(6) "Community property" is as defined in section 32-906, Idaho Code.

(7) "Conservator" means a person who is appointed by a court to manage the estate of a protected person and includes limited conservators as described by section 15-5-420, Idaho Code.

(8) "Court" means the court or branch having jurisdiction in matters relating to the affairs of decedents, minors, incapacitated and disabled persons. This court in this state is known as the district court.

(9) "Determination of heirship of community property" shall mean that determination required by the provisions of section 15-3-303, Idaho Code, upon an application for informal probate not accompanied by presentation of a will.

(10) "Determination of heirship" shall mean that determination of heirship required by section 15-3-409, Idaho Code, upon a finding of intestacy.

(11) "Devise," when used as a noun, means a testamentary disposition of real or personal property and when used as a verb, means to dispose of real or personal property by will.

(12) "Devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee or trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(13) "Disability," with respect to an individual, means any mental or physical impairment which substantially limits one (1) or more major life activities of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning, or working, or a record of such an impairment, or being regarded as having such an impairment. Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual preference or orientation is not considered an impairment or disability. Whether an impairment substantially limits a major life activity shall be determined without consideration of the effect of corrective or mitigating measures used to reduce the effects of the impairment.

(14) "Distributee" means any person who has received property of a decedent from his personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purpose of this provision "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(15) "Emancipated minor" shall mean any male or female who has been married.

(16) "Estate" means all property of the decedent, including community property of the surviving spouse subject to administration, property of trusts, and property of any other person whose affairs are subject to this code as it exists from time to time during administration.

(17) "Exempt property" means that property of a decedent's estate which is described in section 15-2-403, Idaho Code.



(18) "Fiduciary" includes personal representative, guardian, conservator and trustee.

(19) "Foreign personal representative" means a personal representative of another jurisdiction.

(20) "Formal proceedings" means those conducted before a judge with notice to interested persons.

(21) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment and includes limited guardians as described by section 15-5-304, Idaho Code, but excludes one who is merely a guardian ad litem.

(22) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(23) "Incapacitated person" is as defined in section 15-5-101, Idaho Code.

(24) "Informal proceedings" means those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.

(25) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding. In a guardianship or conservatorship proceeding, it also includes any governmental agency paying or planning to pay benefits to the ward or protected person and any public or charitable agency that regularly concerns itself with methods for preventing unnecessary or overly intrusive court intervention in the affairs of persons for whom protective orders may be sought and that seeks to participate in the proceedings.

(26) "Issue" of a person means all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code.

(27) "Lease" includes an oil, gas, or other mineral lease.

(28) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(29) "Minor" means a male under eighteen (18) years of age or a female under eighteen (18) years of age.

(30) "Mortgage" means any conveyance, agreement or arrangement in which property is used as security.

(31) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his death.

(32) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, or any other legal entity.

(33) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code

by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(34) "Person" means an individual, a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(35) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(36) "Petition" means a written request to the court for an order after notice.

(37) "Proceeding" includes action at law and suit in equity.

(38) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(39) "Protected person" is as defined in section 15-5-101, Idaho Code.

(40) "Protective proceeding" is as defined in section 15-5-101, Idaho Code.

(41) "Quasi-community property" is the property defined by section 15-2-201, Idaho Code.

(42) "Registrar" refers to magistrates or judges of the district court who shall perform the functions of registrar as provided in section 15-1-307, Idaho Code.

(43) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(44) "Separate property" is as defined in section 32-903, Idaho Code.

(45) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution and closing.

(46) "Settlor" includes grantor, trustor, and words of similar import.

(47) "Special administrator" means a personal representative as described by sections 15-3-614 through 15-3-618, Idaho Code.

(48) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(49) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(50) "Successors" means those persons, other than creditors, who are entitled to property of a decedent under his will or this code.

(51) "Supervised administration" refers to the proceedings described in part 5, chapter 3, of this code.

(52) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(53) “Trust” includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. “Trust” excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in chapter 6 of this code, custodial arrangements pursuant to chapter 8, title 68, Idaho Code, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(54) “Trustee” includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(55) “Ward” is as defined in section 15-5-101, Idaho Code.

(56) “Will” is a testamentary instrument and includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will. [I.C., § 15-1-201, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. 1972, ch. 201, § 1, p. 510; am. 1973, ch. 167, § 3, p. 319; am. 1982, ch. 285, § 2, p. 719; am. 1997, ch. 113, § 1, p. 274; am. 2001, ch. 294, § 1, p. 1036; am. 2002, ch. 233, § 1, p. 666; am. 2003, ch. 139, § 1, p. 403; am. 2004, ch. 55, § 1, p. 253; am. 2006, ch. 163, § 1, p. 484; am. 2007, ch. 68, § 1, p. 174; am. 2007, ch. 71, § 1, p. 189.]

## STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 163, added the last sentence in subsection (24).

This section was amended by two 2007 acts which appear to be compatible and have been compiled together.

The 2007 amendment, by ch. 68, alphabetized the definitions and added subsection (46).

The 2007 amendment, by ch. 71, deleted “monetary” preceding “benefits” in the last sentence of subsection (25).

## JUDICIAL DECISIONS

### ANALYSIS

Beneficiary.

Claims.

Community property.

Interested person.

### Beneficiary.

Jury’s determination of damages in favor of a beneficiary, in his action for breach of a contract made by a husband and wife for disposition of a survivor’s estate, was reversed because the trial court and the parties mistakenly believed that the contract establishing the survivor’s estate contained provisions relating to the determination of the beneficiary’s entitlement, and because there was confusion regarding what expenses, particularly attorney fees, could be deducted from his share; the judge handling the probate was best positioned to determine the net

share of any estate beneficiary. *Miller v. Estate of Prater*, 141 Idaho 208, 108 P.3d 355 (2005).

### Claims.

Under § 56-218, the Idaho department of health and welfare could not recover Medicaid benefits paid to a decedent until his spouse died, but its claim for reimbursement was still subject to the deadlines of § 15-3-803(a)(1); as the department did not present its claim within two years after the decedent’s death, the claim was untimely. *State v. Estate of Kaminsky* (In re Estate of Kaminsky), 141



Idaho 436, 111 P.3d 121 (2005).

**Community Property.**

Even though federal law preempted § 56-218, where a marriage settlement agreement transmuted most of husband's and wife's community property and the income from that property into separate property of the husband, the department of health and welfare could recover only community property accumulated after the agreement. Idaho Dep't of Health & Welfare v. Jackman, 132 Idaho 213, 970 P.2d 6 (1998).

**Interested Person.**

Where language of a property settlement in a divorce proceeding stated that any claim wife had for a share of property that was not disclosed during the divorce trial was "specifically reserved" and that the agreement would

not affect any of wife's future claims to such undisclosed property, wife was an "interested person" and entitled to bring an action against the estate of deceased husband claiming her share of property that was secreted away in out-state bank accounts by husband during divorce proceedings. Thornton v. Estate of Thornton, 128 Idaho 773, 918 P.2d 1218 (1996).

**Cited in:** Hogan v. Hermann, 101 Idaho 893, 623 P.2d 900 (1980); Cahoon v. Seaton, 102 Idaho 542, 633 P.2d 607 (1981); Spencer v. Idaho First Nat'l Bank, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984); Olson v. Kirkham, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986); Salfeety v. Seideman, 127 Idaho 817, 907 P.2d 794 (1995); Landis v. DeLaRosa, 137 Idaho 405, 49 P.3d 410 (2002).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Heirs.  
Minors.

**Heirs.**

Statutes governing succession in property determines who are the heirs of an intestate decedent and the common law definition of heirs does not apply. In re Hornsby's Estate, 75 Idaho 361, 272 P.2d 1017 (1954).

**Minors.**

The fact that the Idaho legislature abolished differing ages of majority for men and women was proof that whatever purpose may have been considered to be served when such

a differential was first adopted in 1864, it no longer exists. Harrigfeld v. District Court of Seventh Judicial Dist., 95 Idaho 540, 511 P.2d 822 (1973).

Although the Uniform Probate Code did not go into effect until July 1, 1972, the legislative intent in this state by 1971 was to accord adult status to all persons at age eighteen which included the deceased who was twenty years of age at his death in 1971. Harrigfeld v. District Court of Seventh Judicial Dist., 95 Idaho 540, 511 P.2d 822 (1973).

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 10, 130 et seq., 240.

79 Am. Jur. 2d, Wills, § 2.

**C.J.S.** — 94 C.J.S., Wills, § 1.

COMMENT TO OFFICIAL TEXT

Special definitions for Articles V and VI [Chapters 5 and 6] are contained in 5-101, 6-101, and 6-301. Except as controlled by special definitions applicable to these partic-

ular Articles, or applicable to particular sections, the definitions in 1-201 apply to the entire Code.

PART 3. SCOPE, JURISDICTION AND COURTS

**15-1-301. Territorial application.** — Except as otherwise provided in this code, this code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected, domiciled in this state, (2) the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state, (3) incapacitated persons and minors in this state, (4) survivorship and related accounts

in this state, and (5) trusts subject to administration in this state. [I.C., § 15-1-301, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### Nonresident Decedents.

Where tort claimant filed a petition to have out-of-state decedent's estate probated but did not allege that there was property of the

decedent "located in this state," the trial court should have granted motion to dismiss. In re Estate of Pierce, 96 Idaho 335, 528 P.2d 679 (1974).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Nonresident decedents.

Personal property.

#### Nonresident Decedents.

The probate court of Ada County did not have jurisdiction to appoint an administrator for a resident of California, who was killed in an automobile accident in Payette County, merely on the basis that the nonresident had left an asset in Idaho, to wit an automobile liability insurance policy, and such appointment was void and subject to collateral attack. Feil v. Dice, 135 F. Supp. 851 (D. Idaho 1955).

#### Personal Property.

General rule prevails here that succession to and disposition of and distribution of personal property is controlled by the law of the domicile of owner, or intestate, at time of his death, without regard to where property is located or where owner died. Vansickle v. Hazeltine, 29 Idaho 228, 158 P. 326 (1916).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 139, 140.

79 Am. Jur. 2d, Wills, § 748 et seq.  
**C.J.S.** — 95 C.J.S., Wills, § 524 et seq.

### 15-1-302. [Reserved.]

**15-1-303. Venue — Multiple proceedings — Transfer.** — (a) Where a proceeding under this code could be maintained in more than one (1) place in this state, the court in which the proceeding is first commenced has the exclusive right to proceed.

(b) If proceedings concerning the same estate, protected person, ward or trust are commenced in more than one (1) court of this state, the court in which the proceeding[s] was [were] first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(c) If a court finds that in the interest of justice, a proceeding or file should be located in another court of this state, the court making the finding may transfer the proceeding or file to the other court. [I.C., § 15-1-303, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The bracketed letter “s” and word “were” in subsection (b) were inserted by the compiler for clarity.

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 100, 101.  
77 Am. Jur. 2d, Venue, § 18.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 14 et seq.  
95 C.J.S., Wills, § 529.

**15-1-304. [Reserved.]**

**15-1-305. Records and certified copies.** — The clerk of court shall keep a single file for each decedent, ward, protected person or trust involved in any document which may be filed with the court under this code, including petitions and applications, demands for notices or bonds, trust registrations, and of any orders or responses relating thereto by the registrar or court, and establish and maintain a system for indexing, filing or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to probated wills must indicate whether the decedent was domiciled in this state and whether the probate was formal or informal. Certificates relating to letters must show the date of appointment. [I.C., § 15-1-305, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 15A Am. Jur. 2d, Clerks of Courts, § 28.  
31 Am. Jur. 2d, Executors and Administrators, § 151.

**C.J.S.** — 21 C.J.S., Courts, § 341.

**15-1-305A. Recording permitted — Effect.** — Letters of personal representatives (foreign or domestic), a statement of informal probate, probated will, determination of heirship, order made in a testacy proceeding, or will otherwise admissible in evidence as provided in section 15-3-102 of this code; any deed, assignment, release or other instrument executed by an appointed personal representative of the decedent; an affidavit of a successor in interest to property of a decedent; and a decree in any testacy proceeding in another state, any of which affect title to real property, may be recorded in the office of the county recorder of the county in which the real property affected by any such letters, statement, determination, order, document or decree is located. From the time of filing the same for record, notice is imparted to all persons of the contents thereof. [I.C., § 15-1-305A, as added by 1971, ch. 111, § 1, p. 233.]



## STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**15-1-306. Jury trial.** — If duly demanded, a party is entitled to trial by jury in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury. [I.C., § 15-1-306, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Jury selection and service, § 2-201 et seq., I.R.C.P., Rules 47(a) — 47(p).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1122.

80 Am. Jur. 2d, Wills, § 895.

**C.J.S.** — 95 C.J.S., Wills, § 647.

**15-1-307. Registrar — Powers.** — The acts and orders which this code specifies as performable by the registrar will be performed by a magistrate or district judge. [I.C., § 15-1-307, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487.]

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 93, 257, 258.

**15-1-308, 15-1-309. [Reserved.]**

**15-1-310. Oath or affirmation on filed documents.** — Except as otherwise specifically provided in this code or by rule, every document filed with the court under this code including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein. [I.C., § 15-1-310, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 149.

**15-1-311. Exercise of powers.** — Powers under this act may be exercised by the court at any time, in chambers or in open court, as may be appropriate. Powers conferred upon the registrar of wills by this act may be exercised at any time. [I.C., § 15-1-311, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" and compiled in chapters 1 through 7 of this title. presumably refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1

**15-1-312. Execution of deed.** — Should any persons be entitled to a deed from a personal representative and such personal representative be discharged or disqualified or refuse to execute the same, such deed may be executed by the court authorizing such sale or distribution or the clerk of such court and shall entitle the buyer or distributee to his property. [I.C., § 15-1-312, as added by 1971, ch. 111, § 1, p. 233.]

PART 4. NOTICE, PARTIES AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

**15-1-401. Notice — Method and time of giving.** — (a) If notice of a hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

- (1) by mailing a copy thereof at least fourteen (14) days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known;
- (2) by delivering a copy thereof to the person being notified personally at least fourteen (14) days before the time set for the hearing; or
- (3) if the address, or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for three (3) consecutive weeks, a copy thereof in a newspaper having general circulation in the county where the hearing is to be held, the last publication of which is to be at least ten (10) days before the time set for the hearing.

(b) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(c) Proof of the giving of notice shall be made by affidavit or in any other manner permitted by the court at or before the hearing and filed in the proceeding. [I.C., § 15-1-401, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 4, p. 319.]

## STATUTORY NOTES

**Cross References.** — Commencement of probate proceedings, §§ 15-3-301, 15-3-401.

## JUDICIAL DECISIONS

**Failure to Give Notice.**

Where the personal representative of an estate, who had been informally appointed by

the probate court, attempted to formally close the estate pursuant to § 15-3-1001, his failure to send notice to all interested persons, as

required by this section, would not be excused by some of those parties having actual or constructive notice, since constructive notice is insufficient and the allegations of actual notice were conjectural in nature. *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Constructive notice.  
Effect of notice.  
Mailing of notice presumed.

**Constructive Notice.**

Attorneys for will proponents and proponents are charged with notice of every official act in proceedings taken in accordance with law. *Fite v. French*, 54 Idaho 104, 30 P.2d 360 (1934).

**Effect of Notice.**

Probate proceedings in the settlement of estates are in the nature of proceedings in rem and the giving of statutory notice will charge the world with such notice. *Connolly v.*

*Probate Court*, 25 Idaho 35, 136 P. 205 (1913).

**Mailing of Notice Presumed.**

Where record is silent as to mailing of notice of hearing of application for letters testamentary to heirs of testator, it will be presumed, for the purposes of an action by residuary legatee on bond of executor to recover share distributed to him by decree of probate court, that the notice was mailed. *Knowles v. Kasiska*, 46 Idaho 379, 268 P. 3 (1928).

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 153, 154.  
80 Am. Jur. 2d, Wills, § 808 et seq.  
**C.J.S.** — 95 C.J.S., Wills, § 553 et seq.

**A.L.R.** — Heirs: Duty and liability of executor with respect to locating and giving notice to legatees, devisees, or heirs. 10 A.L.R.3d 547.

**15-1-402. Notice — Waiver.** — A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding. The appearance in court of an interested party is a waiver of notice. [I.C., § 15-1-402, as added by 1971, ch. 111, § 1, p. 233.] \*

**15-1-403. Pleadings — When parties bound by others — Notice.** — In judicial proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply:

(a) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(b) Persons are bound by orders binding others in the following cases:

(1) Orders binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one (1) in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(2) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing



or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent and bind his minor child.

(3) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

(c) Notice is required as follows:

(1) Notice as prescribed by section 15-1-401 of this code shall be given to every interested person or to one who can bind an interested person as described in subsection b(1) or b(2) of this section. Notice may be given both to a person and to another who may bind him.

(2) Notice is given to unborn or unascertained persons, who are not represented under subsection b(1) or b(2) of this section, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(d) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding. [I.C., § 15-1-403, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

#### JUDICIAL DECISIONS

**Cited in:** House v. Mine Safety Appliances Co., 573 F.2d 609 (9th Cir. 1978).

#### COMMENT TO OFFICIAL TEXT

A general power, as used here and in Section 1-108, is one which enables the power holder to draw absolute ownership to himself. The section assumes a valid general power. If

the validity of the power itself were in issue, the power holder could not represent others, as for example, the takers in default.

## CHAPTER 2

## INTESTATE SUCCESSION — WILLS

## PART 1. INTESTATE SUCCESSION

## SECTION.

- 15-2-101. Intestate estate.
- 15-2-102. Share of the spouse.
- 15-2-103. Share of heirs other than surviving spouse.
- 15-2-103A. [Repealed.]
- 15-2-104. Requirement that heir survive decedent for 120 hours.
- 15-2-105. [Repealed.]
- 15-2-106. Representation.
- 15-2-107. Kindred of half blood.
- 15-2-108. Afterborn heirs.
- 15-2-109. Meaning of child and related terms.
- 15-2-110. Advancements.
- 15-2-111. Debts to decedent.
- 15-2-112. Alienage.
- 15-2-113. [Reserved.]
- 15-2-114. Persons related to decedent through two lines.

PART 2. SUCCESSION OF QUASI-COMMUNITY  
PROPERTY — ELECTIVE SHARE OF SURVIVING  
SPOUSE

- 15-2-201. Quasi-community property.
- 15-2-202. Augmented estate.
- 15-2-203. Elective right to quasi-community property and augmented estate.
- 15-2-204. Right of election personal.
- 15-2-205. Proceeding for elective share — Time limit.
- 15-2-206. Effect of election on benefits by will or statute.
- 15-2-207. Liability of others.
- 15-2-208. Waiver.
- 15-2-209. Election of nondomiciliary.

PART 3. SPOUSE AND CHILDREN UNPROVIDED FOR IN  
WILLS

- 15-2-301. Omitted spouse.
- 15-2-302. Pretermitted children.

PART 4. EXEMPT PROPERTY AND ALLOWANCES

- 15-2-401. Applicable law.
- 15-2-402. Homestead allowance.
- 15-2-403. Exempt property.
- 15-2-404. [Repealed.]
- 15-2-405. Source — Determination — Documentation — Miscellaneous provisions.
- 15-2-406. Limitations on exempt property and homestead allowance by will.

PART 5. WILLS

- 15-2-501. Who may make a will.
- 15-2-502. Execution.

## SECTION.

- 15-2-503. Holographic will.
- 15-2-504. Self-proved will.
- 15-2-505. Who may witness.
- 15-2-506. Choice of law as to execution.
- 15-2-507. Revocation by writing or by act.
- 15-2-508. Revocation by divorce — No revocation by other changes of circumstances.
- 15-2-509. Revival of revoked will.
- 15-2-510. Incorporation by reference.
- 15-2-511. Testamentary additions to trusts.
- 15-2-512. Events of independent significance.
- 15-2-513. Separate writing identifying bequest of tangible property.

PART 6. RULES OF CONSTRUCTION

- 15-2-601. Requirement that devisee survive testator by 120 hours.
- 15-2-602. Choice of law as to meaning and effect of wills.
- 15-2-603. Rules of construction and intention.
- 15-2-604. Construction that will passes all property — After-acquired property.
- 15-2-605. Anti-lapse — Deceased devisee — Class gifts.
- 15-2-606. Failure of testamentary provision.
- 15-2-607. Change in securities — Accessions — Nonademption.
- 15-2-608. Nonademption of specific devises in certain cases — Unpaid proceeds of sale, condemnation or insurance — Sale by conservator.
- 15-2-609. Nonexoneration.
- 15-2-610. Exercise of power of appointment.
- 15-2-611. Construction of generic terms to accord with relationships as defined for intestate succession.
- 15-2-612. Ademption by satisfaction.
- 15-2-613. Simultaneous death — Disposition of property.
- 15-2-614. Effect of devise.
- 15-2-615. [Repealed.]
- 15-2-616. Restriction on devises to nursing home or residential or assisted living facility operators.

PART 7. CONTRACTUAL ARRANGEMENTS RELATING TO  
DEATH

- 15-2-701. Contracts concerning succession.

PART 8. GENERAL PROVISIONS

- 15-2-801. Renunciation.
- 15-2-802. Effect of divorce, annulment, and decree of separation.

## SECTION.

15-2-803. Effect of homicide on distribution at death.

## SECTION.

15-2-902. Duty of custodian of will — Liability.

## PART 9. CUSTODY AND DEPOSIT OF WILLS

## PART 10. WILL REGISTRY

15-2-901. [Reserved.]

15-2-1001. Will registry.

## PART 1. INTESTATE SUCCESSION

**15-2-101. Intestate estate.** — Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this code. [I.C., § 15-2-101, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Notice to creditors, § 15-3-801.

## JUDICIAL DECISIONS

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Common law.  
Conflict of laws.  
Intestate property.  
Passing of title to property to heirs.  
Shares of stock.

**Common Law.**

A complete system for the succession to property of decedents is provided for; hence, court will not consider the common law. In *re* Reil's Estate, 70 Idaho 64, 211 P.2d 407 (1949); In *re* Hornsby's Estate, 75 Idaho 361, 272 P.2d 1017 (1954).

**Conflict of Laws.**

The general rule is that succession and distribution of personal property, wherever situated, is governed by the *lex domicilii* of the owner or intestate at the time of his death: but, so far as creditors are concerned, each state will deal with the property of a decedent within its jurisdiction according to its own laws. *Vansickle v. Hazeltine*, 29 Idaho 228, 158 P. 326 (1916).

**Intestate Property.**

Bequest of one-fourth of residue of estate to testatrix's brother who died two weeks after death of testatrix vested in legatee as of testatrix's death, and passed under his will and not as property as to which he died intestate. In *re* Zimmer's Estate, 47 Idaho

364, 276 P. 302 (1929).

**Passing of Title to Property to Heirs.**

Property of one dying without disposing thereof by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of the administrator appointed by the court. *Reed v. Stewart*, 12 Idaho 699, 87 P. 1002 (1906).

If the will clearly discloses that the testator did not dispose of all his property, particularly in the absence of a residual clause, then the omitted property must descend according to the laws of succession. In *re* Corwin's Estate, 86 Idaho 1, 383 P.2d 339 (1963).

**Shares of Stock.**

Shares of stock in a corporation are personal property and descend according to the laws of the state of domicile of the owner at his death; certificates of shares of stock, constituting evidence of ownership of such stock, are transferred according to the laws of the state in which the corporation was organized. *State ex rel. Peterson v. Dunlap*, 28 Idaho 784, 156 P. 1141 (1916).



## RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 8.

**C.J.S.** — 26A C.J.S., Descent and Distribution, §§ 1-4.

**A.L.R.** — Inheritance by illegitimate from mother's other illegitimate children. 7 A.L.R.3d 677.

Family settlement of intestate estate. 29 A.L.R.3d 174.

Right of heir's assignee to contest will. 39 A.L.R.3d 696.

Right of adopted child to inherit from intestate natural grandparent. 60 A.L.R.3d 631.

Legitimation by marriage to natural father of child born during mother's marriage to another. 80 A.L.R.3d 219.

Rights in decedent's estate as between legal and putative spouse. 81 A.L.R.3d 6.

Estoppel or laches precluding lawful spouse from asserting rights in decedent's estate as against putative spouse. 81 A.L.R.3d 110.

Modern status: inheritability or descendability of right to contest will. 11 A.L.R.4th 907.

## COMMENT TO OFFICIAL TEXT

## [General comment to §§ 15-2-101 — 15-2-11.]

Part 1 of Article II [Chapter 2] contains the basic pattern of intestate succession historically called descent and distribution. It is no longer meaningful to have different patterns for real and personal property, and under the proposed statute all property not disposed of by a decedent's will passes to his heirs in the same manner. The existing statutes on descent and distribution in the United States vary from state to state. The most common pattern for the immediate family retains the imprint of history, giving the widow a third of realty (sometimes only for life by her dower right) and a third of the personalty, with the balance passing to issue. Where the decedent is survived by no issue, but leaves a spouse and collateral blood relatives, there is wide variation in disposition of the intestate estate, some states giving all to the surviving spouse, some giving substantial shares to the blood relatives. The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want.

A principal purpose of this Article [Chapter] and Article III [Chapter 3] of the Code is to provide suitable rules and procedures for the person of modest means who relies on the estate plan provided by law. For a discussion of this important aspect of the Code, see 3

Real Property, Probate and Trust Journal (Fall 1968) p. 199.

The principal features of Part 1 are:

(1) A larger share is given to the surviving spouse, if there are issue, and the whole estate if there are no issue or parent.

(2) Inheritance by collateral relatives is limited to grandparents and those descended from grandparents. This simplifies proof of heirship and eliminates will contests by remote relatives.

(3) An heir must survive the decedent for five days in order to take under the statute. This is an extension of the reasoning behind the Uniform Simultaneous Death Act and is similar to provisions found in many wills.

(4) Adopted children are treated as children of the adopting parents for all inheritance purposes and cease to be children of natural parents; this reflects modern policy of recent statutes and court decisions.

(5) In an era when inter vivos gifts are frequently made within the family, it is unrealistic to preserve concepts of advancement developed when such gifts were rare. The statute provides that gifts during lifetime are not advancements unless declared or acknowledged in writing.

While the prescribed patterns may strike some as rules of law which may in some cases defeat intent of a decedent, this is true of every statute of this type. In assessing the changes it must therefore be borne in mind that the decedent may always choose a different rule by executing a will.

**15-2-102. Share of the spouse.** — The intestate share of the surviving spouse is as follows:

(a) As to separate property:

(1) If there is no surviving issue or parent of the decedent, the entire intestate estate;

(2) If there is no surviving issue but the decedent is survived by a parent or parents, one-half (1/2) of the intestate estate;

(3) If there are surviving issue of the deceased spouse, one-half (1/2) of the intestate estate.

(b) As to community property:

(1) The one-half (1/2) of community property which belongs to the decedent passes to the surviving spouse. [I.C., § 15-2-102, as added by 1971, ch. 111, § 1, p. 233; am. 2001, ch. 330, § 1, p. 1160.]

### STATUTORY NOTES

**Cross References.** — Effect of homicide on distribution, § 15-2-803.

Homestead allowance, § 15-2-402.

Notice to creditors, § 15-3-801.

Where surviving spouse is sole legatee or devisee, § 15-3-1205.

Who is not "surviving spouse," § 15-2-802.

Witness to will, § 15-2-505.

### JUDICIAL DECISIONS

#### ANALYSIS

Community property.

Parents of decedent.

#### Community Property.

Where title to motel held as community property vested in administratrix as surviving spouse upon decedent's death under this section, surviving spouse in her role as administratrix was under no obligation to account to the heirs for her sale of the motel, rentals received, or any other disposition she may have chosen, since she was absolute owner. *Freeburn v. Freeburn*, 101 Idaho 739, 620 P.2d 773 (1980).

#### Parents of Decedent.

Under this section and § 15-2-103, where the deceased leaves both a surviving spouse and issue, parents of a decedent are not

entitled to inherit any property; therefore, parents are not "heirs" of their son and, not being "heirs," they have no cause of action under § 5-311 for their son's wrongful death. *Everett v. Trunnell*, 105 Idaho 787, 673 P.2d 387 (1983) (decided prior to 1984 revision of § 5-311).

**Cited in:** *In re Reichert*, 95 Idaho 647, 516 P.2d 704 (1973); *House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir. 1978); *Hogan v. Hermann*, 101 Idaho 893, 623 P.2d 900 (1980); *Schiess v. Bates*, 107 Idaho 794, 693 P.2d 440 (1984); *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 747 P.2d 18 (1987).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Heirs where no issue.

Rights of widow.

#### Heirs Where No Issue.

Under former section dealing with succession of property, the parents and surviving spouse were the heirs of a decedent in the event there was no issue. *Hogan v. Hermann*, 101 Idaho 893, 623 P.2d 900 (1980).

#### Rights of Widow.

Rights given to widow by former section were in lieu of dower and could not be disposed of by husband by antenuptial will, but such will, if made, would be deemed to be revoked by marriage. *Morgan v. Ireland*, 1 Idaho 786 (1880).

A wife who, although separated from her husband, does not assert her right of interest in his property until after his death is not guilty of laches or estopped from asserting such right if she then prosecutes her action with diligence. *Hilton v. Stewart*, 15 Idaho 150, 96 P. 579 (1908).

A wife has no vested interest in the separate property of her husband; at most her interest therein is but an expectancy, subject to being defeated by his will. *Radermacher v. Radermacher*, 61 Idaho 261, 100 P.2d 955 (1940).

## RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 109 et seq.

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 60 et seq.

**A.L.R.** — Abandonment, desertion, or refusal to support on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 A.L.R.3d 446.

Adultery on part of surviving spouse as

affecting marital rights in deceased spouse's estate. 13 A.L.R.3d 486.

Estate tax as element in computation of widow's share in estate. 70 A.L.R.3d 630.

Rights in decedent's estate as between legal and putative spouse. 81 A.L.R.3d 6.

Estoppel or laches precluding lawful spouse from asserting rights in decedent's estate as against putative spouse. 81 A.L.R.3d 110.

## COMMENT TO OFFICIAL TEXT

This section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed. A husband or wife who desires to leave the surviving spouse less than the share provided by this section may do so by executing a will, subject of course to possible election by the surviving spouse to take an elective share of one-third under Part 2 of this Article [Chapter]. Moreover, in the small estate (less than

\$50,000 after homestead allowance, exempt property, and allowances) the surviving spouse is given the entire estate if there are only children who are issue of both the decedent and the surviving spouse; the result is to avoid protective proceedings as to property otherwise passing to their minor children. [Idaho did not adopt the provisions directing the passing of the first \$50,000 before dividing intestate shares.]

See Section 2-802 for the definition of spouse which controls for purposes of intestate succession.

**15-2-103. Share of heirs other than surviving spouse.** — The part of the intestate estate not passing to the surviving spouse under section 15-2-102 of this part, or the entire intestate estate if there is no surviving spouse, passes as follows:

(a) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;

(b) If there is no surviving issue, to his parent or parents equally;

(c) If there is no surviving issue or parent, to the issue of the parents or either of them by representation;

(d) If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one (1) or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparents on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half. [I.C., § 15-2-103, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 5, p. 319.]



## STATUTORY NOTES

**Cross References.** — Renunciation, § 15-2-801.

## JUDICIAL DECISIONS

### ANALYSIS

Children and grandchildren.  
Parents of decedent.

### Children and Grandchildren.

Where owner of property died intestate leaving as her heirs her children and the surviving grandchildren of those children who had predeceased her, all such heirs became cotenants in the property. *Fairchild v. Fairchild*, 106 Idaho 147, 676 P.2d 722 (Ct. App. 1984).

### Parents of Decedent.

Under § 15-2-102 and this section, where the deceased leaves both a surviving spouse and issue, parents of a decedent are not entitled to inherit any property; therefore,

parents are not "heirs" of their son and, not being "heirs," they have no cause of action under § 5-311 for their son's wrongful death. *Everett v. Trunnell*, 105 Idaho 787, 673 P.2d 387 (1983) (decided prior to 1984 revision of § 5-311).

**Cited in:** *House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir. 1978); *Hogan v. Hermann*, 101 Idaho 893, 623 P.2d 900 (1980); *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981); *Schiess v. Bates*, 107 Idaho 794, 693 P.2d 440 (1984); *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 747 P.2d 18 (1987).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Burden of proof.  
Invalid will.  
Parent of decedent.

### Burden of Proof.

In action by children of decedent's half-sister as next of kin and heirs at law entitled to inherit on failure of their mother to claim estate within five years, burden of proving that they were the only heirs was on claimants. *Connolly v. Elder*, 293 F. 5 (9th Cir.), cert. denied, 263 U.S. 717, 44 S. Ct. 191, 68 L. Ed. 523 (1923).

### Invalid Will.

Where a will, which gave all property to two children to the exclusion of other children, was declared invalid because of undue influence exercised by said two children they,

nevertheless, remained heirs of the estate, and were "tenants in common" of the estate with the other children. In re *Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

### Parent of Decedent.

Attempt of divorced mother of a minor child to reconvey land previously conveyed to such minor fails, and on death of minor his mother is one of his heirs and is entitled to a half-interest in his share of said land. *Lamb v. Brammer*, 29 Idaho 770, 162 P. 246 (1916).

## RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 66 et seq.

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 25.

**A.L.R.** — Right of heir or devisee to have

realty exonerated from lien thereon at expense of personal estate. 4 A.L.R.3d 1023.

Adopted child, right to inherit from intestate natural grandparent. 60 A.L.R.3d 631.

## COMMENT TO OFFICIAL TEXT

This section provides for inheritance by lineal descendants of the decedent, parents

and their descendants, and grandparents and collateral relatives descended from grandpar-

ents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

In general the principle of representation (which is defined in Section 2-106) is adopted as the pattern which most decedents would prefer.

If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under Section 2-801.

### 15-2-103A. Limitation upon testamentary ability. [Repealed.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 15-2-103A as added by S.L.

1971, ch. 111, § 1, was repealed by S.L. 1972, ch. 201, § 2.

**15-2-104. Requirement that heir survive decedent for 120 hours.** — Any person who fails to survive the decedent by one hundred twenty (120) hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by one hundred twenty (120) hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under section 15-2-105 of this Part. [I.C., § 15-2-104, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Cross References.** — Devisee must survive decedent by 120 hours, § 15-2-601. Simultaneous death, § 15-2-613.

**Compiler's Notes.** — Section 15-2-105, referred to above, was repealed in 1996. See § 14-113.

#### COMMENT TO OFFICIAL TEXT

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property, for a comparable provision as to wills, see Section 2-601. This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. The five-day period will not hold up administration of a decedent's estate because sections 3-302 and 3-307 prevent informal probate of a will or informal issuance of letters for a period of five days from death. The last sentence prevents

the survivorship requirement from affecting inheritances by the last eligible relative of the intestate who survives him for any period.

I.R.C. § 2056(b) (3) makes it clear that an interest passing to a surviving spouse is not made a "terminable interest" and thereby disqualified for inclusion in the marital deduction by its being conditioned on failure of the spouse to survive a period not exceeding six months after the decedent's death, if the spouse in fact lives for the required period. Thus, the intestate share of a spouse who survives the decedent by five days is available for the marital deduction. To assure a marital deduction in cases where one spouse fails to survive the other by the required period, the decedent must leave a will. The marital deduction is not a problem in the typical intestate estate. The draftsmen and Special Committee concluded that the statute should accommodate the typical estate to which it

applies, rather than the unusual case of an unplanned estate involving large sums of money.

### 15-2-105. No taker. [Repealed.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 15-2-105, as added by 1971, ch. 111, § 1, p. 233; am. 1980, ch. 281, § 3, p. 730; am. 1984, ch. 36, § 4, p. 60; am. 1992, ch. 21, § 7, p. 67, was repealed by S.L. 1996, ch. 69, § 7, effective July 1, 1996.

**15-2-106. Representation.** — If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one (1) share and the share of each deceased person in the same degree being divided among his issue in the same manner. [I.C., § 15-2-106, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 89 et seq.

**C.J.S.** — 26A C.J.S., Descent and Distribution, §§ 27, 28.

#### COMMENT TO OFFICIAL TEXT

Under the system of intestate succession in effect in some states, property is directed to be divided "per stirpes" among issue or descendants or identified ancestors. Applying a meaning commonly associated with the quoted words, the estate is first divided into the number indicated by the number of children of the ancestor who survive, or who leave issue, who survive. If, for example, the property, is directed to issue "per stirpes" of the intestate's parents, the first division would be by the number of children of parents (other than the intestate) who left issue surviving even though no person of this generation survives. Thus, if the survivors are a child

and a grandchild of a deceased brother of the intestate and five children of his deceased sister, the brother's descendants would divide one-half and the five children of the sister would divide the other half. Yet if the parent of the brother's grandchild also had survived, most statutes would give the seven nephews and nieces equal shares because it is commonly provided that if all surviving kin are in equal degree, they take per capita.

The draft rejects this pattern and keys to a system which assures that the first and principal division of the estate will be with reference to a generation which includes one or more living members.

**15-2-107. Kindred of half blood.** — Relatives of the half blood inherit the same share they would inherit if they were of the whole blood. [I.C., § 15-2-107, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 71.

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 42.

**15-2-108. Afterborn heirs.** — Relatives of the decedent conceived by natural or artificial means before his death but born within ten (10) months after the decedent's date of death, shall inherit as if they had been born in



the lifetime of the decedent. [I.C., § 15-2-108, as added by 1971, ch. 111, § 1, p. 233; am. 2005, ch. 123, § 1, p. 407.]

### RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 108.

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 34.

**15-2-109. Meaning of child and related terms.** — If, for purposes of intestate succession, a relationship of parents and child must be established to determine succession by, through, or from a person:

(a) An adopted person is a child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent and adoption by the spouse of a natural parent has no effect on the relationship between the child and a deceased, undivorced natural parent.

(b) In cases not covered by subsection (a) of this section, a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

- (1) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
- (2) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subparagraph (2) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child. [I.C., § 15-2-109, as added by 1971, ch. 111, § 1, p. 233; am. 1978, ch. 350, § 4, p. 914.]

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Adopted child.  
Illegitimate child.  
Sufficiency of evidence.

#### **Adopted Child.**

In a proceeding by alleged adopted child is given all rights and made subject to all burdens of a natural child, he is entitled to equality of succession with a child by birth. *Scott v. Scott*, 247 F. 976 (D. Idaho 1917).

#### **Illegitimate Child.**

In a proceeding by alleged illegitimate son to establish right to inherit from father, who died in 1951, the plaintiff was entitled to testify concerning statement made by his mother prior to her death in 1941 as to who his father was, since the right asserted by the plaintiff could not have been asserted against the deceased father during his lifetime, and,

at the time of the statement, the mother had no motive to distort the truth since there was no pending litigation. In *re Stone's Estate*, 77 Idaho 63, 286 P.2d 329 (1955).

#### **Sufficiency of Evidence.**

The evidence was sufficient to require a finding that appellant was the illegitimate son of the deceased where prior to hearing on petition for distribution in accordance with the will of deceased, appellant, asserting he was a pretermitted son and sole heir of deceased, filed objections to distribution under the will and prayed the entire estate be distributed to him. In *re Stone's Estate*, 78 Idaho 632, 308 P.2d 597 (1955).

## RESEARCH REFERENCES

**Am. Jur.** — 41 Am. Jur. 2d, Illegitimate children, § 113 et seq.

**C.J.S.** — 14A C.J.S., Children out-of-wedlock, § 64 et seq.

## COMMENT TO OFFICIAL TEXT

The definition of “child” and “parent” in Section 1-201 incorporates the meanings established by this section, thus extending them

for all purposes of the Code. See Section 2-802 for the definition of “spouse” for purposes of intestate succession.

**15-2-110. Advancements.** — If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter’s share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient’s issue, unless the declaration or acknowledgment provides otherwise. If an advancement exceeds the share of the heir, no refund is required. [I.C., § 15-2-110, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Ademption by satisfaction, § 15-2-612.

## JUDICIAL DECISIONS

## DECISIONS UNDER PRIOR LAW

**When Writing Declaring Advancement to Be Made.**

Writings charging a gift as an advancement must be made contemporaneously with the gift and, where a deed of land contained no reference to being an advancement and the only writings designating it as an advance-

ment were entries in account books with no evidence as to when such entries were made, it was error for the trial court to determine such gift of land to be an advancement against the grantee’s share of the grantor’s estate. *Hirning v. Webb*, 91 Idaho 229, 419 P.2d 671 (1966).

## RESEARCH REFERENCES

**Am. Jur.** — 3 Am. Jur. 2d, Advancements, §§ 1, 12 et seq.

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 95.

## COMMENT TO OFFICIAL TEXT

This section alters the common law relating to advancements by requiring written evidence of the intent that an inter vivos gift be an advancement. The statute is phrased in terms of the donee being an “heir” because the transaction is regarded as of decedent’s death; of course, the donee is only a prospective heir at the time of the transfer during lifetime.

Most inter vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during lifetime be deducted from the donee’s share of his estate, the donor may either execute a will so providing or, if he intends to die intestate, charge the gift as an advance by a writing within the present sec-

tion. The present section applies only when the decedent died intestate and not when he leaves a will.

This section applies to advances to collaterals (such as nephews and nieces) as

well as to lineal descendants. The statute does not spell out the method of taking account of the advance, since this process is well settled by the common law and is not a source of litigation.

**15-2-111. Debts to decedent.** — A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue. [I.C., § 15-2-111, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Cross References.** — Claims against decedent, § 15-3-104.

Right of retainer, § 15-3-903.

#### RESEARCH REFERENCES

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 70.

#### COMMENT TO OFFICIAL TEXT

This supplements the content of Section 3-903, *infra*.

**15-2-112. Alienage.** — No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien. [I.C., § 15-2-112, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Cross References.** — Validity of foreign wills, § 15-2-506.

#### RESEARCH REFERENCES

**Am. Jur.** — 3B Am. Jur. 2d, Aliens and Citizens, § 2081 et seq.

**C.J.S.** — 3 C.J.S., Aliens, § 155.

#### COMMENT TO OFFICIAL TEXT

The purpose of this section is to eliminate the ancient rule that an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obligations of the tenant to the King. Although there never was a corresponding rule as to personalty, the present section is phrased in light of the basic premise of the Code that distinctions between real and personal property should be abolished.

This section has broader vitality in light of the recent decision of the United States Su-

preme Court in *Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968) holding unconstitutional a state statute providing for escheat if a nonresident alien cannot meet three requirements: the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country, the right of United States citizens to receive payment here of funds from estates in the foreign country, and the right of the foreign heirs to receive the proceeds of the local estate with-



out confiscation by the foreign government. The rationale was that such a statute involved the local probate court in matters which essentially involve United States foreign policy, whether or not there is a govern-

ing treaty with the foreign country. Hence, the statute is "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."

### **15-2-113. [Reserved.]**

**15-2-114. Persons related to decedent through two lines. —** A person who is related to the decedent through two (2) lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share. [I.C., § 15-2-114, as added by 1978, ch. 350, § 5, p. 914.]

## **COMMENT TO OFFICIAL TEXT**

This section prevents double inheritance. It has potential application in a case in which a deceased person's brother or sister marries the spouse of the decedent and adopts a child of the former marriage; if the adopting parent

died thereafter leaving the child as a natural and adopted grandchild of its grandparents, this section prevents the child from taking as an heir from the grandparents in both capacities.

## **PART 2. SUCCESSION OF QUASI-COMMUNITY PROPERTY — ELECTIVE SHARE OF SURVIVING SPOUSE**

**15-2-201. Quasi-community property. —** (a) Upon death of a married person domiciled in this state, one-half (1/2) of the quasi-community property shall belong to the surviving spouse and the other one-half (1/2) of such property shall be subject to the testamentary disposition of the decedent and, if not devised by the decedent, goes to the surviving spouse.

(b) Quasi-community property is all personal property, wherever situated, and all real property situated in this state which has heretofore been acquired or is hereafter acquired by the decedent while domiciled elsewhere and which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time of its acquisition plus all personal property, wherever situated, and all real property situated in this state, which has heretofore been acquired or is hereafter acquired in exchange for real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired, provided that real property does not and personal property does include leasehold interests in real property, provided that quasi-community property shall include real property situated in another state and owned by a domiciliary of this state if the laws of such state permit descent and distribution of such property to be governed by the laws of this state.

(c) All quasi-community property is subject to the debts of decedent. [I.C., § 15-2-201, as added by 1972, ch. 201, § 4, p. 510.]

## STATUTORY NOTES

**Cross References.** — Who is a “surviving spouse,” § 15-2-802.

**Prior Laws.** — Sections which originally comprised Part 2 of Chapter 2 of this title,

I.C., §§ 15-2-201—15-2-207 as added by S.L. 1971, ch. 111, § 1, were repealed by S.L. 1972, ch. 201, § 3. Section 4, S.L. 1972, ch. 201, inserted new matter in lieu thereof.

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

In general.

Abandonment.

Common law marriage.

Community debts.

Construction.

Intestacy.

Procedure.

Separate and community property.

Spouses' rights and duties.

Testamentary disposition.

### In General.

Though the death of one of the spouses dissolves the marital community, it does not leave the estate in the condition of a partnership when one of the partners dies. *Pierson v. Pierson*, 63 Idaho 1, 115 P.2d 742 (1941).

### Abandonment.

A wife who leaves her husband, whether in the wrong or not, is entitled to share in the community property up to the time of her act of abandonment. *Peterson v. Peterson*, 35 Idaho 470, 207 P. 425 (1922).

### Common Law Marriage.

A common law marriage may serve as a proper basis for establishing a community of property, especially where the equities are strongly in favor of such marriage. *Huff v. Huff*, 20 Idaho 450, 118 P. 1080 (1911).

### Community Debts.

Where judgment is rendered against the husband individually and as executor of the estate of his deceased wife, it could not be collected from her separate estate, and there could be no judgment against the estate except insofar as the estate profited from the community property. *Pierson v. Pierson*, 63 Idaho 1, 115 P.2d 742 (1941).

Where the surviving husband of the marital community had the management and control of the community estate and business during the wife's lifetime, the husband was personally liable for community debts, and the whole of the community property was liable therefor. *Pierson v. Pierson*, 63 Idaho 1, 115 P.2d 742 (1941).

### Construction.

Former section must be construed with other sections of the statutes in regard to

devolution of property and did not change general rule that succession to, and disposition and distribution of, personal property, wherever situated, is governed by *lex domicilii* of owner or intestate at time of his death, without regard to location of property or place of his death. *Vansickle v. Hazeltine*, 29 Idaho 228, 158 P. 326 (1916).

### Intestacy.

Upon the death of husband or wife without testamentary disposition of his or her share of the community property, it goes to the survivor subject to community debts, family allowance, and administration expenses. *Shaw v. McDougall*, 56 Idaho 697, 58 P.2d 463 (1936).

### Procedure.

In sons' action against their father individually, and as executor of the deceased mother's estate, under contracts with the father, the father, as executor, was a “proper party” defendant, since though no individual judgment could be obtained against the estate for the claim, the indebtedness, if found to exist, was a charge against the entire community property and collectible out of the community estate, without, or independent of, any administration of the estate. *Pierson v. Pierson*, 63 Idaho 1, 115 P.2d 742 (1941).

### Separate and Community Property.

In case of property that was the separate estate of intestate, the former section made the wife and children heirs-to-be; but in case of its having been community property, the wife is the sole heir. *Powell v. Powell*, 22 Idaho 531, 126 P. 1058 (1912).

Decree of probate court determining character of property as between widow and

mother was not subject to collateral attack by independent action by mother for specific performance of agreement, stipulating that certain property was that of deceased separately, and providing for equal distribution. *Larsen v. Larsen*, 44 Idaho 211, 256 P. 369 (1927).

Where wife possessing separate property permitted title, with her knowledge, to be taken in name of her husband, and during lifetime knowingly permitted title to remain in him, which representation on her part made it possible for husband after her death to represent himself as sole owner of property in mortgaging it, husband as administrator was estopped to claim property as that of deceased wife to same extent that she would be estopped were she living. *Moore v. Craft*, 47 Idaho 568, 277 P. 425 (1929).

### Spouses' Rights and Duties.

Former section recognized husband and wife as equal partners in community estate and authorized each to dispose of his or her half by will. It also provided that survivor continued to be owner of half of such property subject only to the payment of community debts. Such statute clearly and unmistakably provided that surviving spouse takes his or her half of community property, not by succession, descent, or inheritance, but as survivor of the marital community or partnership. *Kohny v. Dunbar*, 21 Idaho 258, 121 P. 544 (1912); *Ewald v. Hufton*, 31 Idaho 373, 173 P. 247 (1918); *Peterson v. Peterson*, 35 Idaho 470, 207 P. 425 (1922); *Radermacher v.*

*Radermacher*, 61 Idaho 261, 100 P.2d 955 (1940); *Davenport v. Simons*, 68 Idaho 21, 189 P.2d 90 (1947).

Where statute in effect at time of deceased's death provided that "no administration of estate of wife shall be necessary if she dies intestate," and husband was told that there was no need of administration at all, he was relieved of any duty to put in motion machinery for collection of inheritance tax. *State ex rel. Gallet v. Naylor*, 50 Idaho 113, 294 P. 333 (1930).

The interest of the wife in the community property is a vested interest, and as to degree, quality, nature and extent is the same as that of her husband. *Davenport v. Simons*, 68 Idaho 21, 189 P.2d 90 (1947).

### Testamentary Disposition.

This section gives husband the right to will a life estate to wife in his half of community with their children as reversioners, but wife retains her half interest in the property, which interest she has a right to contract away. *Amonson v. Amonson*, 55 Idaho 42, 37 P.2d 228 (1934).

While a decedent's one-half interest in the community property is subject to testamentary disposition and while the executor, under a will, may be authorized to sell said half interest, together with decedent's separate property, it does not follow that the executor has authority to sell the one-half interest of the surviving spouse in the community property. *Davenport v. Simons*, 68 Idaho 21, 189 P.2d 90 (1947).

## RESEARCH REFERENCES

**Am. Jur.** — 15 Am. Jur. 2d, Community Property, § 109 et seq.

**A.L.R.** — Abandonment, desertion, or refusal to support on part of surviving spouse as affecting marital right in deceased spouse's estate. 13 A.L.R.3d 446.

Adultery on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 A.L.R.3d 486.

Rights of surviving spouse taking under or against will as affected by provision in will

directing conversion. 33 A.L.R.3d 1280.

Right in decedent's estate as between legal and putative spouse. 81 A.L.R.3d 6.

Estoppel or laches precluding lawful spouse from asserting rights in decedent's estate as against putative spouse. 81 A.L.R.3d 110.

Extent of rights of surviving spouse who elects to take against will in profits of or increase in value of estate accruing after testator's death. 7 A.L.R.4th 989.

## COMMENT TO OFFICIAL TEXT

### [General comment to §§ 15-2-201 — 15-2-207.]

[Attention is called to the fact that this Part (§§ 15-2-201 — 15-2-209) as amended in 1972 varies considerably from the Uniform Probate Code for which these comments were written.] The sections of this Part describe a system for common law states designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the

survivor of a "fair share" of the decedent's estate. Optional sections adapting the elective share system to community property jurisdictions were contained in preliminary drafts, but were dropped from the final Code. Problems of disherison of spouses in community states are limited to situations involving assets acquired by domiciliaries of common law states who later become domiciliaries of a community property state, and to instances where substantially all of a deceased spouse's



property is separate property. Representatives of community property states differ in regard to whether either of these problem areas warrant statutory solution.

Almost every feature of the system described herein is or may be controversial. Some have questioned the need for any legislation checking the power of married persons to transfer their property as they please. See Plager, "The Spouse's Nonbarrable Share: A Solution in Search of a Problem", 33 Chi. L. Rev. 681 (1966). Still, virtually all common law states impose some restriction on the power of a spouse to disinherit the other. In some, the ancient concept of dower continues to prevent free transfer of land by a married person. In most states, including many which have abolished dower, a spouse's protection is found in statutes which give a surviving spouse the power to take a share of the decedent's probate estate upon election rejecting the provisions of the decedent's will. These statutes expand the spouse's protection to all real and personal assets owned by the decedent at death, but usually take no account of various will substitutes which permit an owner to transfer ownership at his death without use of a will. Judicial doctrines identifying certain transfers to be "illusory" or to be in "fraud" of the spouse's share have been evolved in some jurisdictions to offset the problems caused by will substitutes, and, in New York and Pennsylvania, statutes have extended the elective share of a surviving spouse to certain non-testamentary transfers.

Questions relating to the proper size of a spouse's protected interest may be raised in addition to those concerning the need for, and method of assuring, any protection. The traditions in both common law and community property states point toward some capital sum related to the size of the deceased spouse's holdings rather than to the needs of the surviving spouse. The community property pattern produces one-half for the surviving spouse, but is somewhat misleading as an analogy, for it takes no account of the decedent's separate property. The fraction of one-third, which is stated in Section 2-201 [not in Idaho], has the advantage of familiarity, for it is used in many forced share statutes.

Although the system described herein may seem complex, it should not complicate administration of a married person's estate in

any but very unusual cases. The surviving spouse rather than the executor or the probate court has the burden of asserting an election, as well as the burden of proving the matters which must be shown in order to make a successful claim to more than he or she has received. Some of the apparent complexity arises from Section 2-202, which has the effect of compelling an electing spouse to allow credit for all funds attributable to the decedent when the spouse, by electing, is claiming that more is due. This feature should serve to reduce the number of instances in which an elective share will be asserted. Finally, Section 2-204 expands the effectiveness of attempted waivers and releases of rights to claim an elective share. Thus, means by which estate planners can assure clients that their estates will not become embroiled in election litigation are provided.

Uniformity of law on the problems covered by this Part is much to be desired. It is especially important that states limit the applicability of rules protecting spouses so that only estates of domiciliary decedents are involved.

#### [Comment to 15-2-201.]

See Section 2-802 for the definition of "spouse" which controls this Part.

Under the common law a widow was entitled to dower, which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. Dower encumbers titles and provides inadequate protection for widows in a society which classifies most wealth as personal property. Hence, the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy. Few existing forced share statutes make adequate provisions for transfers by means other than succession to the surviving spouse and others. This and the following sections are designed to do so. The theory of these sections is discussed in Fratcher, "Toward Uniform Succession Legislation," 41 N.Y.U. L. Rev. 1037, 1050-1064 (1966). The existing law is discussed in MacDonald, *Fraud on the Widow's Share* (1960). Legislation comparable to that suggested here became effective in New York on Sept. 1, 1966. See Decedent Estate Law, § 18 [CLS EPTL § 5-1.1].

**15-2-202. Augmented estate.** — Whenever a married person domiciled in the state has made a transfer of quasi-community property to a person other than the surviving spouse without adequate consideration and without the consent of the surviving spouse, the surviving spouse may require the transferee to restore to the decedent's estate such property, if the transferee retains such property and, if not, its proceeds or, if none, its value at the time of transfer, if:

(a) The decedent retained, at the time of his death, the possession or enjoyment of or the right to income from the property; or

(b) The decedent retained, at the time of his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit; or

(c) The decedent held the property at the time of his death with another with the right of survivorship; or

(d) The decedent had transferred such property within two (2) years of his death to the extent that the aggregate transfers to any one (1) donee in either of the years exceeded ten thousand dollars (\$10,000) or the amount of the annual exclusion for the federal gift tax set forth at 26 U.S.C. section 2503, whichever is greater. [I.C., § 15-2-202, as added by 1972, ch. 201, § 4, p. 510; am. 1999, ch. 303, § 1, p. 760.]

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Insurance policy.

Insurance policy proceeds.

Slayer of spouse.

Wife's interest.

#### **Insurance Policy.**

Where the property insured and insurance policy were a part of the community property and the husband died intestate, the plaintiff became the sole heir to the husband's share of the community assets. *Lewis v. Snake River Mut. Fire Ins. Co.*, 82 Idaho 329, 353 P.2d 648 (1960).

#### **Insurance Policy Proceeds.**

Where insured wife made a change of beneficiary from her husband to her daughter without the consent and knowledge of her husband, thus attempting to make a gift of the proceeds of the policy to the daughter, since premiums had been paid with community funds, the change of beneficiary was voidable insofar as it applied to husband's

half interest. *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 292 P.2d 760 (1956).

#### **Slayer of Spouse.**

A wife convicted of the voluntary manslaughter of her husband is not, thereby, disqualified from succeeding to the community property. *Anstine v. Hawkins*, 92 Idaho 561, 447 P.2d 677 (1968) (see § 15-2-803).

#### **Wife's Interest.**

The wife's interest in the community property is a present vested estate, and she has an equal interest in same with her husband, except for the management of the estate. *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 292 P.2d 760 (1956).

## COMMENT TO OFFICIAL TEXT

The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements. Thus essentially

two separate groups of property are added to the net probate estate to arrive at the augmented net estate which is the basis for computing the one-third share of the surviving spouse. In the first category are transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property. However, only transfers during the marriage are included in this category. This makes it possible for a person to provide for children by a prior marriage, as by a revocable living trust, without concern that such provisions will be upset by later mar-



riage. The limitation to transfers during marriage reflects some of the policy underlying community property. What kinds of transfers should be included here is a matter of reasonable difference of opinion. The fine-spun tests of the Federal Estate Tax Law might be utilized, of course. However, the objectives of a tax law are different from those involved here in the Probate Code, and the present section is therefore more limited. It is intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate.

In the second category of assets, property of the surviving spouse derived from the decedent and property derived from the decedent which the spouse has, in turn, given away in a transaction that is will-like in effect or purpose, the scope is much broader. Thus, a person can during his lifetime make outright gifts to relatives and they are not included in this first category unless they are made within two years of death (the exception being designed to prevent a person from depleting his estate in contemplation of death). But the time when the surviving spouse derives her wealth from the decedent is immaterial; thus if a husband has purchased a home in the wife's name and made systematic gifts to the wife over many years, the home and accumulated wealth she owns at his death as a result of such gifts ought to, and under this section do, reduce her share of the augmented estate. Likewise, for policy reasons life insurance is not included in the first category of transfers to other persons, because it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse; but life insurance proceeds payable to the surviving spouse are included in the second category, because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance. In this category no distinction is drawn as to whether the transfers are made before or after marriage.

Depending on the circumstances it is obvious that this section will operate in the long run to decrease substantially the number of elections. This is because the statute will encourage and provide a legal base for counseling of testators against schemes to disinherit the spouse, and because the spouse can no longer elect in cases where substantial provision is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other numerous

nonprobate arrangements by which wealth is today transferred. On the other hand the section should provide realistic protection against disinheritance of the spouse in the rare case where decedent tries to achieve that purpose by depleting his probate estate.

The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted. The proposed scheme should not complicate administration in well-planned or routine cases, however, because the spouse's rights are freely releasable under Section 2-204 and because of the time limits in Section 2-205. Some legislatures may wish to consider a simpler approach along the lines of the Pennsylvania Estates Act provision reading:

"A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary vested in enjoyment prior to the death of the conveyor. The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise."

In passing, it is to be noted that a Pennsylvania widow apparently may claim against a revocable trust or will even though she has been amply provided for by life insurance or other means arranged by the decedent. Penn. Stats. Annot. title 20, § 301.11(a).

The New York Estates, Powers and Trusts Law § 5-1.1(b) also may be suggested as a model. It treats as testamentary dispositions all gifts *causa mortis*, money on deposit by the decedent in trust for another, money deposited in the decedent's name payable on death to another, joint tenancy property, and transfers by decedent over which he has a power to revoke or invade. The New York law also expressly excludes life insurance, pension plans, and United States savings bonds payable to a designated person. One of the drawbacks of the New York legislation is its complexity, much of which is attributable to the effort to prevent a spouse from taking an elective share when the deceased spouse has followed certain prescribed procedures.

**15-2-203. Elective right to quasi-community property and augmented estate.** — (a) The right of the surviving spouse in the augmented quasi-community property estate shall be elective and shall be limited to one-half (1/2) of the total augmented quasi-community property estate



which will include, as a part of the property described in section 15-2-201 and section 15-2-202, of this code, property received from the decedent and owned by the surviving spouse at the decedent's death, plus the value of such property transferred by the surviving spouse at any time during marriage to any person other than the decedent which would have been in the surviving spouse's quasi-community property augmented estate if that spouse had predeceased the decedent to the extent that the owner's transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or moneys worth. This shall not include any benefits derived from the federal social security system by reason of service performed or disability incurred by the decedent and shall include property transferred from the decedent to the surviving spouse by virtue of joint ownership and through the exercise of a power of appointment also exercisable in favor of others than the surviving spouse and appointed to the surviving spouse.

(b) The elective share to the quasi-community estate thus computed shall be reduced by an allocable portion of general administration expenses, homestead allowance, family allowance, exempt property and enforceable claims.

(c) Property owned by the surviving spouse at the time of the decedent's death and property transferred by the surviving spouse is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source. [I.C., § 15-2-203, as added by 1978, ch. 350, § 2, p. 914.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 15-2-203, which comprised I.C., § 15-2-203, as added by 1972, ch. 201, § 4, p. 510, was repealed by S.L. 1978, ch. 350, § 1.

**15-2-204. Right of election personal.** — The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy. [I.C., § 15-2-204, as added by 1972, ch. 201, § 4, p. 510.]

#### STATUTORY NOTES

**Cross References.** — Definition of "protected person," and "protective proceeding," § 15-1-201. Protective proceedings, § 15-5-401 et seq.

**15-2-205. Proceeding for elective share — Time limit.** — (a) The surviving spouse may elect to take his elective share in the augmented net estate by filing in the court and mailing or delivering to the personal representative a petition for the elective share within nine (9) months after the death of the decedent or six (6) months after the date of filing of the petition for probate, whichever is later. The court may extend the time for

election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under section 15-2-207 of this code. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions. [I.C., § 15-2-205, as added by 1972, ch. 201, § 4, p. 510; am. 1973, ch. 167, § 6, p. 319; am. 1999, ch. 73, § 1, p. 196.]

**15-2-206. Effect of election on benefits by will or statute. —**

(a) The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under subsection 15-2-207(b), as if the surviving spouse had predeceased the testator.

(b) A surviving spouse is entitled to homestead allowance, exempt property and family allowance whether or not he elects to take an elective share and whether or not he renounces the benefits conferred upon him by the will except that, if it clearly appears from the will that a provision therein made for the surviving spouse was intended to be in lieu of these rights, he is not so entitled if he does not renounce the provision so made for him in the will. [I.C., § 15-2-206, as added by 1972, ch. 201, § 4, p. 510.]

**JUDICIAL DECISIONS**

**Cited in:** *Simmons v. Ewing*, 96 Idaho 380, 529 P.2d 776 (1974).

## COMMENT TO OFFICIAL TEXT

The election does not result in a loss of benefits under the will (in the absence of renunciation) because those benefits are charged against the elective share under Sections 2-201, 2-202, and 2-207(a).

**15-2-207. Liability of others.** — (a) In a proceeding for an elective share, property which passes or has passed to the surviving spouse by testate or intestate succession and property included in the augmented estate which has not been renounced is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

(b) The remaining amount of the elective share is equitably apportioned among beneficiaries of the will and transferees of the augmented estate in proportion to the value of their interest therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate. [I.C., § 15-2-207, as added by 1972, ch. 201, § 4, p. 510; am. 1978, ch. 350, § 3, p. 914.]

**15-2-208. Waiver.** — The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of “all rights” (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement. [I.C., § 15-2-208, as added by 1972, ch. 201, § 4, p. 510.]

## STATUTORY NOTES

**Cross References.** — Exempt property, § 15-2-403.  
Homestead allowance, § 15-2-402.  
Who is “surviving spouse,” § 15-2-803.

**Compiler’s Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

## COMMENT TO OFFICIAL TEXT

The right to homestead allowance is conferred by Section 2-401, that to exempt property by Section 2-402, and that to family allowance by Section 2-403. The right to renounce interests passing by testate or intestate succession is recognized by Section 2-801.

The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse’s property seem desirable in view of the com-



mon and commendable desire of parties to second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The opera-

tion of a property settlement as a waiver and renunciation takes care of the situation which arises when a spouse dies while a divorce suit is pending.

JUDICIAL DECISIONS

Surviving Spouse.

Surviving wife was a surviving spouse by virtue of her remarriage following the divorce with the decedent; the wife did not sign the property settlement agreement in contempla-

tion of the parties' remarriage and, therefore, did not sign it after full disclosure. *Barnedt v. Wilder*, 137 Idaho 415, 49 P.3d 1265 (Ct. App. 2002).

**15-2-209. Election of nondomiciliary.** — Upon the death of any married person not domiciled in this state who dies leaving a valid will disposing of real property in this state which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property was situated in the decedent's domicile at death. [I.C., § 15-2-209, as added by 1972, ch. 201, § 4, p. 510.]

RESEARCH REFERENCES

- Am. Jur. — 25 Am. Jur. 2d, Domicil, § 1 et seq.
- C.J.S. — 28 C.J.S., Domicile, § 2 et seq.

PART 3. SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

**15-2-301. Omitted spouse.** — (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) In satisfying a share provided by this section, the devises made by the will abate as provided in section 15-3-902 of this code. [I.C., § 15-2-301, as added by 1971, ch. 111, § 1, p. 233.]

JUDICIAL DECISIONS

ANALYSIS

- Determination against validity of will.
- Devise made before contemplation of marriage.
- Minimal devise.
- Purpose.
- When not omitted spouse.

Determination Against Validity of Will.

A determination that someone is an omitted spouse under this section is a determination

“against ... the validity of a will” for the purpose of appeal under § 17-201(3) the will remains partially valid and subdivision 3 of

§ 17-201 should not be read to mean court's order must be against or in favor of the validity of the whole will before an appeal can be taken under this section. *Keeven v. Wakley*, 110 Idaho 452, 716 P.2d 1224 (1986).

### **Devise Made Before Contemplation of Marriage.**

A testator can "provide by will for his surviving spouse" in such a way as to prevent the recipient from being an "omitted spouse" under this section even though the devise was not expressly made in contemplation of marriage. *Keeven v. Wakley*, 110 Idaho 452, 716 P.2d 1224 (1986).

### **Minimal Devise.**

It is possible that the devise in the will to the surviving spouse is so minimal and made in such a way that it appears the testator failed "to provide by will for his surviving spouse"; the burden of establishing this, however, is on the surviving spouse. In order to satisfy this burden, the evidence must be sufficient to establish that the testamentary gift specified before the marriage could not reasonably represent the testator's effort "to

provide by will for his surviving spouse." *Keeven v. Wakley*, 110 Idaho 452, 716 P.2d 1224 (1986).

### **Purpose.**

This section is designed to avoid the unintentional disinheritance of the spouse of a testator who executes a will prior to the marriage but neglects to revise it afterwards. *Keeven v. Wakley*, 110 Idaho 452, 716 P.2d 1224 (1986).

### **When Not Omitted Spouse.**

Where the decedent and her husband had an intimate personal relationship and were living together well before the will was executed, and the decedent provided that her husband have a portion of her real property equal to that of one of her children, and, when statutory allowances were included, his share far exceeded the share of any of the children, the husband was amply provided for by the will and by the statutory allowances, and he could not be considered an omitted spouse. *Keeven v. Wakley*, 110 Idaho 452, 716 P.2d 1224 (1986).

## **COMMENT TO OFFICIAL TEXT**

Section 2-508 provides that a will is not revoked by a change of circumstances occurring subsequent to its execution other than as described by that section. This section reflects the view that the intestate share of the spouse is what the decedent would want the spouse

to have if he had thought about the relationship of his old will to the new situation. The effect of this section should be to reduce the number of instances where a spouse will claim an elective share.

**15-2-302. Pretermitted children.** — (a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

- (1) it appears from the will that the omission was intentional;
- (2) when the will was executed the testator had one (1) or more children and devised substantially all his estate to the other parent of the omitted child; or
- (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devises made by the will abate as provided in section 15-3-902 of this code. [I.C., § 15-2-302, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 5, p. 510.]

# JUDICIAL DECISIONS

**Cited in:** Keeven v. Wakley, 110 Idaho 452, 716 P.2d 1224 (1986).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Instructions as to omission.  
Presumption as to omission.  
Revocation of will provision.

### Instructions as to Omission.

The failure of the court to instruct the jury on the omission of the testator to provide in his will for any of his children or for the issue of any deceased child was not prejudicial where the verdict of the jury, although general, was its answer to specific questions of fact and the succession statute had nothing to do with the ability of the jury to make answers to the special questions. In *re Stone's Estate*, 78 Idaho 632, 308 P.2d 597 (1955).

### Presumption as to Omission.

Presumption is that omission was unintentional; in order to rebut this presumption it must appear in the will, by direct language or by language so strong as to render any other conclusion unreasonable, that testator had the omitted heir in mind at the time will was drawn and intentionally omitted such heir from the will. In *re Fell's Estate*, 70 Idaho 399, 219 P.2d 941 (1950).

The fact that testator disposed of all of his property to designated beneficiaries furnishes no ground for the inference that he had in mind and intentionally omitted to provide for

other heirs. In *re Fell's Estate*, 70 Idaho 399, 219 P.2d 941 (1950).

### Revocation of Will Provision.

Testatrix, aged 73, an Indian woman who could neither read, write nor speak English, who, in her will, left a life estate to son in real estate covered by her allotment, but who sold the real estate prior to her death, omitted to provide for son as though the revoked portion of her will had never been included, and son was, therefore, entitled to share in her estate as a pretermitted heir. *Halfmoon v. Moore*, 77 Idaho 247, 291 P.2d 846 (1955).

Where testatrix devised a life estate in her allotted land to her son and the remainder interest to her granddaughter, but sold the allotted land prior to her death, and balance of funds remaining from sale were distributed by Bureau of Indian Affairs to son and granddaughter respectively as life tenant and remainderman, such distribution did not bar parties from claiming in estate as pretermitted heirs, but such funds would be considered as advances to the two heirs in question. *Halfmoon v. Moore*, 77 Idaho 247, 291 P.2d 846 (1955).

## RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1535 et seq.

**A.L.R.** — Adopted child as subject to pro-

tection of statute regarding rights of children pretermitted by will, or statute preventing disinheritance of child. 43 A.L.R.4th 947.

## COMMENT TO OFFICIAL TEXT

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his existing children because of mistaken belief that the child is dead.

Although the sections dealing with advancement and ademption by satisfaction (2-110 and 2-612) provide that a gift during lifetime is not an advancement or satisfaction unless the testator's intent is evidenced in writing, this section permits oral evidence to establish a testator's intent that lifetime gifts

or nonprobate transfers such as life insurance or joint accounts are in lieu of a testamentary provision for a child born or adopted after the will. Here there is no real contradiction of testamentary intent, since there is no provision in the will itself for the omitted child.

To preclude operation of this section, it is not necessary to make any provision, even nominal in amount, for a testator's present or future children; a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would meet the requirement of (a)(1).



Under subsection (c) and Section 3-902, any intestate estate would first be applied to satisfy the share of a pretermitted child.

This section is not intended to alter the rules of evidence applicable to statements of a decedent.

#### PART 4. EXEMPT PROPERTY AND ALLOWANCES

**15-2-401. Applicable law.** — This part applies to the estate of a decedent who dies domiciled in this state. Rights to the homestead allowance and to exempt property for a decedent who dies not domiciled in this state are governed by the law of the decedent's domicile at death. [I.C., § 15-2-401, as added by 2001, ch. 294, § 2, p. 1036]; am. 2008, ch. 182, § 1, p. 549.]

#### STATUTORY NOTES

**Amendments.** — The 2008 amendment, by ch. 182, substituted “Rights to the homestead allowance and to exempt property for a decedent” for “Rights to the homestead allowance, exempt property, and the family allow-

ance for a decedent” in the last sentence.

**Compiler's Notes.** — Former § 15-2-401 was amended and redesignated as § 15-2-402 by S.L. 2001, ch. 294, § 3.

#### COMMENT TO OFFICIAL TEXT

**[General comment to §§ 15-2-401 — 15-2-406.]**

For decedents who die domiciled in this State, this part grants various allowances to the decedent's surviving spouse and certain children. The allowances have priority over unsecured creditors of the estate and persons to whom the estate may be devised by will. If there is a surviving spouse, all of the allowances described in this Part, which (as revised to adjust for inflation) total \$25,000, plus whatever is allowed to the spouse for support during administration, normally pass to the spouse. If the surviving spouse and minor or dependent children live apart from one another, the minor or dependent children may receive some of the support allowance. If there is no surviving spouse, minor or dependent children become entitled to the homestead exemption of \$15,000 and to support allowances. The exempt property section confers rights on the spouse, if any, or on all children, to \$10,000 in certain chattels, or funds if the unencumbered value of chattels is below the \$10,000 level. This provision is designed in part to relieve a personal repre-

sentative of the duty to sell household chattels when there are children who will have them.

These family protection provisions supply the basis for the important small estate provisions of Article III, Part 12.

States adopting the Code may see fit to alter the dollar amounts suggested in these sections, or to vary the terms and conditions in other ways so as to accommodate existing traditions. Although creditors of estates would be aided somewhat if all family exemption provisions relating to probate estates were the same throughout the country, there is probably less need for uniformity of law regarding these provisions than for any of the other parts of this article. Still, it is quite important for all states to limit their homestead, support allowance and exempt property provisions, if any, so that they apply only to estates of decedents who were domiciliaries of the state.

**[Cross Reference.]**

Notice that under Section 2-104 a spouse or child claiming under this Part must survive the decedent by 120 hours.

**15-2-402. Homestead allowance.** — The homestead allowance is exempt from and has priority over all claims against the estate except as hereinafter set forth. The homestead allowance is in addition to any share passing to the surviving spouse or minor or disabled child by the will of the decedent unless otherwise provided in the will, or by intestate succession, or by way of elective share. The amount of the homestead allowance shall be fifty thousand dollars (\$50,000). The homestead allowance is not a right to

claim ownership of, or succession to, any homestead owned by the decedent at the time of the decedent's death but is only the right to claim the sum set forth above. The right to a homestead allowance is determined as follows:

(a) If there is a surviving spouse of the decedent, the surviving spouse shall be entitled to a homestead allowance.

(b) If there is no surviving spouse, and there are one (1) or more children under the age of twenty-one (21) years whom the decedent was obligated to support or children who were in fact being supported by the decedent and who are disabled, as provided in 42 U.S.C. section 1382c, then each such minor or disabled child is entitled to a portion of the homestead allowance in the amount of the homestead allowance divided by the number of such minor or disabled children entitled to receive the homestead allowance. [I.C., § 15-2-401, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. and redesign. 2001, ch. 294, § 3, p. 1036; am. 2004, ch. 123, § 1, p. 412; am. 2008, ch. 182, § 2, p. 549.]

### STATUTORY NOTES

**Cross References.** — Who is “surviving spouse,” § 15-2-802.

**Amendments.** — The 2008 amendment, by ch. 182, rewrote the section to the extent that a detailed comparison is impracticable.

**Compiler's Notes.** — This section was formerly compiled as § 15-2-401.

Former § 15-2-402 was amended and redesignated as § 15-2-403 by S.L. 2001, ch. 294, § 4.

### JUDICIAL DECISIONS

#### ANALYSIS

Constitutionality.  
Prior homestead.

#### Constitutionality.

The dual use of “homestead” in this section and in § 55-1001 does not make this section vague in violation of Idaho Const., Art. III, § 17. *Simmons v. Ewing*, 96 Idaho 380, 529 P.2d 776 (1974).

This section is not unconstitutionally vague in failing to specify from what property the allowance is first taken; where the will passes all the community property to the surviving spouse, it is clear that the homestead allowance must come from the remaining property. *Simmons v. Ewing*, 96 Idaho 380, 529 P.2d 776 (1974).

#### Prior Homestead.

A showing that no prior homestead had been set aside during life of deceased spouse is not a prerequisite for claiming a probate homestead under this statute. *Shaw v. Bowman*, 101 Idaho 131, 609 P.2d 663 (1980).

**Cited in:** *Keeven v. Wakley*, 110 Idaho 452, 716 P.2d 1224 (1986); *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

### RESEARCH REFERENCES

**Am. Jur.** — 40 Am. Jur. 2d, Homestead, § 1 et seq.

31 Am. Jur. 2d, Executors and Administrators, § 954.

**C.J.S.** — 40 C.J.S., Homesteads, § 141 et seq.

**A.L.R.** — Statutory family allowance to minor children as affected by previous agreement or judgment for their support. 6 A.L.R.3d 1387.

Waiver of right to widow's allowance by postnuptial agreement. 9 A.L.R.3d 955.

Eligibility of illegitimate child to receive family allowance out of the estate of his deceased father. 12 A.L.R.3d 1140.

Waiver of right to widow's allowance by antenuptial agreement. 30 A.L.R.3d 858.

## COMMENT TO OFFICIAL TEXT

See Section 2-802 for the definition of “spouse” which controls in this Part. Also, see Section 2-104. Waiver of homestead is covered by Section 2-204. “Election” between the provision of a will and homestead is covered by Section 2-206.

A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-402. The “small estate” line is controlled largely, though not entirely, by the size of the homestead allow-

ance. This is because Part 12 of Article III [Chapter 3] dealing with small estate rests on the assumption that the only justification for keeping a decedent’s assets from his creditors is to benefit the decedent’s spouse and children.

Another reason for a set amount is related to the fact that homestead allowance may prefer a decedent’s minor or dependent children over his other children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the decedent.

**15-2-403. Exempt property.** — In addition to any homestead allowance, the decedent’s surviving spouse is entitled from the estate to [a] value, not exceeding ten thousand dollars (\$10,000) in excess of any security interests therein, in tangible personal property including, but not limited to, household furniture, automobiles, furnishings, appliances, family heirlooms and personal effects, subject to the terms of section 15-2-406, Idaho Code. If there is no surviving spouse, the decedent’s children are entitled jointly to the same tangible personal property, subject to the terms of section 15-2-406, Idaho Code. Rights to exempt property have priority over all claims against the estate. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent, unless otherwise provided in the will, or by intestate succession, or by way of elective share. [I.C., § 15-2-402, as added by 1971, ch. 111, § 1, p. 233; am. and redesisg. 2001, ch. 294, § 4, p. 1036; am. 2003, ch. 63, § 1, p. 209; am. 2004, ch. 123, § 2, p. 412; am. 2008, ch. 182, § 3, p. 550.]

## STATUTORY NOTES

**Cross References.** — Waiver of rights by “surviving spouse,” § 15-2-208.

Who is “surviving spouse,” § 15-2-802.

**Prior Laws.** — Former § 15-2-403 was amended and redesignated as § 15-2-404 by S.L. 2001, ch. 294, § 5 and was repealed by S.L. 2008, ch. 182, § 4.

**Amendments.** — The 2008 amendment,

by ch. 182, rewrote the section to the extent that a detailed comparison is impracticable.

**Compiler’s Notes.** — This section was formerly compiled as § 15-2-402.

The bracketed insertion in the first sentence was added by the compiler to make the sentence more clear.

## JUDICIAL DECISIONS

**Constitutionality.**

The dual use of “homestead” in this section and in § 55-1001 does not make this section vague in violation of Idaho Const. Art. III, § 17. *Simmons v. Ewing*, 96 Idaho 380, 529 P.2d 776 (1974).

**Cited in:** *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

## OPINIONS OF ATTORNEY GENERAL

The combined effect of this section and §§ 15-2-404 and 15-2-405 likely puts personal

property belonging to the signing spouse at the time of death, with a value of up to



\$28,000, beyond a creditor's reach in the event of the death of the sole spouse who signed the promissory note or loan obligation. OAG 05-1.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 677 et seq., 721, 762. **C.J.S.** — 34 C.J.S., Executors and Administrators, § 460 et seq.

### COMMENT TO OFFICIAL TEXT

As originally adopted in 1969, the dollar amount exempted was set at \$3,500. To adjust for inflation, the amount was increased to \$10,000 in 1990.

Unlike the exempt amount described in Sections 2-402 and 2-404 [repealed], the exempt amount described in this section is available in a case in which the decedent left no spouse but left only adult children. The provision in this section that establishes pri-

orities is required because of possible difference between beneficiaries of the exemptions described in this section and those described in Sections 2-402 and 2-404 [repealed].

Section 2-204 covers waiver of exempt property rights. This section indicates that a decedent's will may put a spouse to an election with reference to exemptions, but that no election is presumed to be required.

### 15-2-404. Family allowance. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 15-2-403, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. and redesign. 2001, ch. 294, § 5, p. 1036; am. 2004, ch. 123, § 3, p. 412, was repealed by S.L. 2008, ch. 182, § 4.

**15-2-405. Source — Determination — Documentation — Miscellaneous provisions.** — If the estate is otherwise sufficient, property specifically devised, including the provisions pursuant to section 15-2-513, Idaho Code, may not be used to satisfy rights to the homestead allowance or exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance or exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there is no guardian of a minor child. The personal representative may execute an instrument to establish the homestead allowance or exempt property. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief. Despite any language to the contrary in this chapter, the homestead allowance and exempt property are not mandatory or automatic, but rather must be applied for by the surviving spouse and/or children, as appropriate, as set forth in this title. Even though the allowance and the right to apply for exempt property are not claims against estates, the manner of and time period for applying for the allowance or the exempt property shall be the same as set forth in sections 15-3-801, 15-3-803 and 15-3-804, Idaho Code; provided however, that the personal representative shall not be required to give actual notice to a surviving spouse or a minor or disabled child of the right to apply for the homestead allowance or the

exempt property, and provided further that any notice actually given by the personal representative does not need to make any additional or special reference to an application by the surviving spouse or minor or disabled or adult children also being barred if not submitted within the time period set forth in the notice. Also, the personal representative shall not be liable to the surviving spouse, minor or disabled or adult child, any creditor, or any other successor to the estate in the same manner as provided in section 15-3-801(c), Idaho Code, as a result of giving or failing to give notice. The homestead allowance and exempt property may not be enforced or applied for on behalf of a surviving spouse or a minor or adult child of the decedent by a creditor of the surviving spouse or a minor or disabled or adult child of the decedent, or by any person or entity claiming by, through, or because of the surviving spouse or minor or disabled or adult child of the decedent. Despite any language to the contrary in other sections of this chapter, the homestead allowance and exempt property do not take precedence over reasonable administrative costs and expenses of the estate of the decedent. [I.C., § 15-2-404, as added by 1971, ch. 111, § 1, p. 233; am. and redesign. 2001, ch. 294, § 6, p. 1036; am. 2004, ch. 123, § 4, p. 412; am. 2008, ch. 182, § 5, p. 550.]

#### STATUTORY NOTES

**Cross References.** — Distribution in kind, §§ 15-3-906, 15-3-907.

Order of distribution; abatement, § 15-3-902.

**Amendments.** — The 2008 amendment,

by ch. 182, rewrote the section to the extent that a detailed comparison is impracticable.

**Compiler's Notes.** — This section was formerly compiled as § 15-2-404.

#### JUDICIAL DECISIONS

**Cited in:** Kolouch v. First Sec. Bank, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

#### OPINIONS OF ATTORNEY GENERAL

The combined effect of this section and §§ 15-2-403 and 15-2-404 likely puts personal property belonging to the signing spouse at the time of death, with a value of up to

\$28,000, beyond a creditor's reach in the event of the death of the sole spouse who signed the promissory note or loan obligation. OAG 05-1.

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 690, 691.

#### COMMENT TO OFFICIAL TEXT

See Sections 3-902, 3-906 and 3-907.

**15-2-406. Limitations on exempt property and homestead allowance by will.** — The decedent may provide by will that a surviving spouse, and/or adult children, but not minor or disabled children:

(1) Are not entitled to any exempt property or homestead allowance; or

(2) Are entitled to limited exempt property or a limited homestead allowance, as provided in the will; but

(3) May not condition such elimination or limitation upon whether the estate of the decedent is subject to a claim for estate recovery for medicaid benefits paid to the decedent or to a spouse of the decedent. [I.C., § 15-2-406, as added by 2008, ch. 182, § 6, p. 552.]

## PART 5. WILLS

**15-2-501. Who may make a will.** — Any emancipated minor or any person eighteen (18) or more years of age who is of sound mind may make a will. A married woman may dispose of her property, whether separate or community, in the same manner as any other person subject to the restrictions imposed by this code. [I.C., § 15-2-501, as added by 1971, ch. 211, § 1, p. 233.]

## JUDICIAL DECISIONS

### Undue Influence.

Even though a 90-year-old testator was legally blind and almost deaf, testimony that the testator was a strong-willed and independent individual who was unlikely to be overborne by beneficiaries was enough to overcome the presumption of invalidity of a will based on undue influence arising from the

fact that beneficiaries were both drafters of the will and sole witnesses to its execution. *Roll v. Roll*, 115 Idaho 797, 770 P.2d 806 (1989).

**Cited in:** *In re Estate of Lane*, 99 Idaho 850, 590 P.2d 577 (1979).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Contract to make will.  
Property subject to disposal.  
Testamentary capacity.\*  
Validity in general.  
Undue influence.

### Contract to Make Will.

A contract between testator and second party may be made whereby testator agrees to devise or bequeath property. Failure to do so gives the promisee an action at law to recover damages. *Casady v. Scott*, 40 Idaho 137, 237 P. 415 (1924).

A mutual contract between husband and wife to leave property at death of the survivor to husband's children did not include property owned absolutely by wife and given away by her before her death. *Ohms v. Church of the Nazarene*, 64 Idaho 262, 130 P.2d 679 (1942).

### Property Subject to Disposal.

Property acquired as legacy from estate of father domiciled in foreign state, and not yet paid, is nevertheless sole and separate property of legatee and may be disposed of by will. *In re Rothchild's Estate*, 48 Idaho 485, 283 P. 598 (1929), cert. denied, 281 U.S. 757, 50 S. Ct. 409, 74 L. Ed. 1167 (1930).

A will operates only upon property legally and equitably belonging to the testator at the time of his death. *Stone v. Fisher*, 65 Idaho 52, 139 P.2d 479 (1943).

### Testamentary Capacity.

A finding that a will was made under duress and undue influence presupposes testamentary capacity, or a sound and disposing mind. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

When the special finding of a jury that a testator was competent to make a will at the time it was made is in conflict with findings that the testator was laboring under an insane delusion and was not of sound and disposing mind, the true test as to such conflicts is whether one would support a different judgment from the one entered. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

A man may possess testamentary capacity and at the same time be unable to transact



ordinary business; but and where a man is able to transact ordinary business, this is sufficient to establish his competency to make a will. *Schwartz v. Taeger*, 44 Idaho 625, 258 P. 1082 (1927).

The physical and mental condition of testator as bearing on testamentary capacity before and after the time of execution of a will is admissible when not too remote, and evidence of mental condition from four to ten days before the execution of a will and one to four days thereafter is admissible. In *re Brown's Estate*, 52 Idaho 286, 15 P.2d 604 (1932).

An instruction to jury which suggests that a person almost bereft of mental power and understanding would still be able to make a valid will and which fails to distinguish between simple and complicated wills is bad. *Hedin v. Westdala Lutheran Church*, 59 Idaho 241, 81 P.2d 741 (1938).

The mental state of deceased on the day she executed a purported will is a question of fact for the trial court sitting without a jury. In *re Brown's Estate*, 61 Idaho 320, 101 P.2d 11 (1940).

#### **Validity in General.**

Although a testator's will should be upheld wherever possible, a will placing the disposal

of the testator's property beyond the supervision of the courts will not be upheld. *Hedin v. Westdala Lutheran Church*, 59 Idaho 241, 81 P.2d 741 (1938).

#### **Undue Influence.**

No presumption of the exercise of undue influence arises by reason of the relation of the parties alone, or from evidence that the wife had opportunity to exercise such influence. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

Questions regarding the sufficiency of evidence to sustain a finding on the issue of undue influence need not be considered where the evidence supports the court's finding of a lack of testamentary capacity. In *re Brown's Estate*, 61 Idaho 320, 101 P.2d 11 (1940).

Where a will which gave all property to two children to the exclusion of other children was declared invalid because of undue influence exercised by said two children, they, nevertheless, remained heirs of the estate and were "tenants in common" of the estate with the other children. In *re Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

### **RESEARCH REFERENCES**

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 47 et seq.

**C.J.S.** — 94 C.J.S., Wills, § 3 et seq.

**A.L.R.** — Sufficiency of testator's acknowledgment of signature from his conduct and the surrounding circumstances. 7 A.L.R.3d 317.

Testamentary capacity as affected by use of intoxicating liquor or drugs. 9 A.L.R.3d 15.

Necessity of laying foundation for opinion of attesting witness as to mental condition of testator or testatrix. 17 A.L.R.3d 503.

Place of signature of attesting witnesses. 17 A.L.R.3d 705; 1 A.L.R.5th 965.

Testator's illiteracy or lack of knowledge of language in which will is written as affecting its validity. 37 A.L.R.3d 889.

May parts of will be upheld notwithstanding failure of other parts for lack of testamentary capacity or undue influence. 64 A.L.R.3d 261.

Necessity that attesting witness realized instrument was intended as will. 71 A.L.R.3d 877.

Existence of illicit or unlawful relation between testator and beneficiary as evidence of undue influence. 76 A.L.R.3d 743.

### **COMMENT TO OFFICIAL TEXT**

#### **[General comment to §§ 15-2-501 — 15-2-513.]**

Part 5 of Article II [Chapter 2] deals with capacity and formalities for execution and revocation of wills. If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a minimum, holographic wills, written and signed by the

testator are authorized, choice of law as to validity of execution is broadened, and revocation by operation of law is limited to divorce or annulment. However, the statute also provides a more formal method of execution with acknowledgment before a public officer (the self-proved will).

#### **[Comment to § 15-2-501.]**

This section states a uniform minimum age of eighteen for capacity to execute a will. "Minor" is defined in Section 1-201, and may involve a different age than that prescribed here.

**15-2-502. Execution.** — Except as provided for holographic wills, writings within section 15-2-513 of this part, and wills within section 15-2-506 of this part, or except as provided in sections 51-109, 55-712A or 55-712B, Idaho Code, every will shall be in writing signed by the testator or in the testator’s name by some other person in the testator’s presence and by his direction, and shall be signed by at least two (2) persons each of whom witnessed either the signing or the testator’s acknowledgment of the signature or of the will. [I.C., § 15-2-502, as added by 1971, ch. 111, § 1, p. 233; am. 2008, ch. 76, § 1, p. 202.]

STATUTORY NOTES

**Cross References.** — Probate and administration of wills, § 15-3-101 et seq. by ch. 76, inserted “or except as provided in sections 51-109, 55-712A or 55-712B, Idaho Code.”

**Amendments.** — The 2008 amendment,

JUDICIAL DECISIONS

ANALYSIS

Applicability.  
Form of will.  
Telephone acknowledgment.  
Witnessing of signature.

**Applicability.**  
The will of any person dying after the effective date of this section must be executed in accordance with its provisions regardless of when the will was signed. In re Estate of Buffi, 98 Idaho 354, 564 P.2d 150 (1977).

**Form of Will.**  
Where the decedent merely signed a rough draft of his will, the document did not meet the formal requirements of the section and the decedent must be considered to have died intestate. In re Estate of Buffi, 98 Idaho 354, 564 P.2d 150 (1977).

**Telephone Acknowledgment.**  
This section preserves the observatory function as well as the signatory function of witnesses. In order for a will to be validly executed, each witness must have observed the testator sign the will or must have observed the testator’s acknowledgment of his or her signature or of the will; accordingly, a telephonic acknowledgment by the testator, without more, will not suffice. McGurrian v.

Scoggin, 113 Idaho 341, 743 P.2d 994 (Ct. App. 1987).

**Witnessing of Signature.**  
Where the magistrate found that not one of the three persons who signed the purported will as a witness ever observed decedent sign the document, and the testimony of the witnesses indicated that not one of them knew before signing the will whether decedent had affixed her signature because they only saw the one page which they signed, there was substantial evidence to support the magistrate’s finding that decedent’s will was not signed by at least two persons, each of whom witnessed the signing of the will, as required by this section. Toms v. Davies, 128 Idaho 303, 912 P.2d 671 (Ct. App. 1995).

The Idaho legislature has not enacted any requirement as to when the witnesses to a will must sign. As such, a will was properly admitted to probate, even though one of the witnesses signed after the testator’s death. Spelius v. Hollon (In re Estate of Miller), 143 Idaho 565, 149 P.3d 840 (2006).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Compliance with section.  
Right to make will.  
Sufficiency of publication.

**Compliance With Section.**

An instrument consisting of two pieces of paper glued together, one containing an agreement and the other the signatures, will not be admitted as evidence of testamentary disposition in the absence of convincing proof that it was in the same condition as when signed. *Diamond v. Connolly*, 276 F. 87 (9th Cir.), cert. denied, 257 U.S. 656, 42 S. Ct. 169, 66 L. Ed. 420 (1921).

Evidence showing the former section had been complied with entitled will to be probated as such, in absence of contest or contrary showing. *Head v. Nixon*, 22 Idaho 765, 128 P. 557 (1912).

**Right to Make Will.**

The right to dispose of property by will is not a property or natural right, and the legislature may prescribe the procedure and conditions under which it may be done. *Hull v. Cartin*, 61 Idaho 578, 105 P.2d 196 (1940).

**Sufficiency of Publication.**

Where a testator produced a will, with what purported to be his signature clearly visible thereon, and asked that it be signed or witnessed by persons present, there has been sufficient acknowledgment of his signature. *Parkison v. Artley*, 93 Idaho 66, 455 P.2d 310 (1969).

**RESEARCH REFERENCES**

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 197 et seq.

**C.J.S.** — 94 C.J.S., Wills, § 217 et seq.

**COMMENT TO OFFICIAL TEXT**

The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and of two witnesses; each of the persons signing as witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will. Signing by the testator may be by mark under general rules relating to what constitutes a signature; or the will may be signed on behalf of the testator by another person signing the testator's name at his direction and in his presence. There is no requirement that the testator publish the document as his will, or that

he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they sign as witnesses. There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills which meet the minimal formalities of the statute.

A will which does not meet these requirements may be valid under Section 2-503 as a holograph.

**15-2-503. Holographic will.** — A will which does not comply with section 15-2-502 of this Part is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator. [I.C., § 15-2-503, as added by 1971, ch. 111, § 1, p. 233.]

**JUDICIAL DECISIONS****Sufficiency.**

Where proponent asserted that handwritten message contained in greeting card sent to her by decedent prior to death was executed with testamentary intent by which decedent intended to devise all his real property to proponent upon his death, but where decedent's widow presented testimony of friends

and relatives that on several occasions decedent had said that he did not have a will and that everything was to go to his wife, the district court did not err in denying the greeting card probate as a holographic will because decedent did not write the card with testamentary intent. *In re Estate of Webber*, 97 Idaho 703, 551 P.2d 1339 (1976).



## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Alterations.  
 Proof of will.  
 Revocation of prior will.  
 Sufficiency.

**Alterations.**

The proponent of a holographic will has the duty of explaining cancellations on such a will, or at least the burden to show that the will was not altered since coming into her hands. In *re Fisher's Estate*, 47 Idaho 668, 279 P. 291 (1929).

Cancellations or erasures of parts of a holographic will are permissible, and if only one clause of such a will is cancelled or obliterated only such clause is revoked. In *re Fisher's Estate*, 47 Idaho 668, 279 P. 291 (1929).

**Proof of Will.**

Testimony of appellant's two half-brothers as to the existence of a lost holographic codicil is insufficient to overturn lower court's finding rejecting the proof of existence of such instrument. *Pedersen v. Moore*, 32 Idaho 420, 184 P. 475 (1919).

Evidence of witnesses as to contents of letter was not sufficiently clear to establish holographic will where the evidence was not as to any positive language and did not man-

ifest a testamentary disposition by deceased. In *re Harrington's Estate*, 43 Idaho 447, 252 P. 868 (1927).

**Revocation of Prior Will.**

A holographic will may revoke a prior will. In *re Hengy's Estate*, 53 Idaho 515, 26 P.2d 178 (1933).

**Sufficiency.**

A holographic will, falling short of statutory requirements as to execution, is not valid although intent of testator is clear. In *re Fisher's Estate*, 47 Idaho 668, 279 P. 291 (1929).

A letter written by deceased to his son, entirely written, dated and signed by him, satisfies every requirement of a holographic will, and, if written with testamentary intent, will be given effect as a will. In *re Hengy's Estate*, 53 Idaho 515, 26 P.2d 178 (1933).

Instrument written, dated and signed in handwriting of deceased is a valid will. In *re Heazle's Estate*, 72 Idaho 307, 240 P.2d 821 (1952).

## RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 612 et seq.

**C.J.S.** — 94 C.J.S., Wills, § 317 et seq.

**A.L.R.** — Use of figures wholly or in part to express date of holographic will as affecting its sufficiency. 22 A.L.R.3d 866.

Requirement that holographic will or its material provisions be entirely in testator's handwriting as affected by appearance of some printed or written matter not in testator's handwriting. 37 A.L.R.4th 528.

## COMMENT TO OFFICIAL TEXT

This section enables a testator to write his own will in his handwriting. There need be no witnesses. The only requirement is that the signature and the material provisions of the will be in the testator's handwriting. By requiring only the "material provisions" to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be "entirely" in the testator's handwrit-

ing) a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will. For persons unable to obtain legal assistance, the holographic will may be adequate.

**15-2-504. Self-proved will.** — (1) Any will may be simultaneously executed, attested, and made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in form and content substantially as follows:

I, ....., the testator, sign my name to this instrument this ..... day of ....., ..., and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

.....  
Testator

We, ....., ....., the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of his knowledge the testator is eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

.....  
Witness

.....  
Witness

The State of .....

County of .....

Subscribed, sworn to and acknowledged before me by ....., the testator and subscribed and sworn to before me by ....., and ....., witnesses, this .... day of .....

(Seal)

(Signed) .....

.....  
(Official capacity of officer)

(2) An attested will may at any time subsequent to its execution be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in form and content substantially as follows:

The State of .....

County of .....

We, ....., ....., and ....., the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the

testator was at that time eighteen (18) years of age or older, of sound mind and under no constraint or undue influence.

.....

Testator

.....

Witness

.....

Witness

Subscribed, sworn to and acknowledged before me by ....., the testator, and subscribed and sworn to before me by ....., and ....., witnesses, this ..... day of .....

(Seal)

(Signed) .....

.....

(Official capacity of officer)

(3) A will may be executed, and made self-proved, in compliance with sections 51-109, 55-712A or 55-712B, Idaho Code, and attested as set forth in subsections (1) and (2) of this section. [I.C., § 15-2-504, as added by 1978, ch. 350, § 7, p. 914; am. 2007, ch. 90, § 2, p. 246; am. 2008, ch. 76, § 2, p. 203.]

STATUTORY NOTES

**Prior Laws.** — Former § 15-2-504, which comprised I.C., § 15-2-504, as added by 1971, ch. 111, § 1, p. 233 was repealed by S.L. 1978, ch. 350, § 6.

**Amendments.** — The 2007 amendment, by ch. 90, inserted “witnesses” in the last paragraph of the form in subsection (b).

The 2008 amendment, by ch. 76, redesignated former subsections (a) and (b) as subsections (1) and (2), respectively, and added subsection (3).

**Compiler’s Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

**Cited in:** McGurrin v. Scoggin, 113 Idaho 341, 743 P.2d 994 (Ct. App. 1987).

COMMENT TO OFFICIAL TEXT

A self-proved will may be admitted to probate as provided in Sections 3-303, 3-405 and 3-406 without the testimony of any subscribing witness, but otherwise it is treated no differently than a will not self-proved. Thus, a self-proved will may be contested (except in regard to signature requirements), revoked, or amended by a codicil in exactly the same fashion as a will not self-proved. The significance of the procedural advantage for a self-proved will is limited to formal testacy proceedings because Section 3-303 dealing with informal probate dispenses with the necessity of testimony of witnesses even though the instrument is not self-proved under this section.

The original text of this section directed that the officer who assisted the execution of a self-proved will be authorized to act by virtue of the laws of “this State”, thereby restricting this mode of execution to wills offered for probate in the state where they were executed. Also, the original text authorized only the addition to an already signed and witnessed will, of an acknowledgment of the testator and affidavits of the witnesses, thereby requiring testator and witnesses, to sign twice even though the entire execution ceremony occurred in the presence of a notary or other official. In 1975, the Joint Editorial Board recommended the substitution of new text that eliminates these problems.



**15-2-505. Who may witness.** — (a) Any person eighteen (18) or more years of age generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness. [I.C., § 15-2-505, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487.]

### JUDICIAL DECISIONS

#### Legislative Intent.

On March 12, 1971, the legislature passed Laws 1971, ch. 111 which was to be codified as this section, and which provided that one generally competent as a witness could witness a will; four days later it passed Laws

1971, ch. 126 amending this section to require such witnesses also be 18 years of age or older, clearly showing its intent to make this requirement mandatory. In re Estate of Lane, 99 Idaho 850, 590 P.2d 577 (1979).

### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 269 et seq.

**A.L.R.** — Competency, as witness attesting

will, of attorney named therein as executor's attorney. 30 A.L.R.3d 1361.

### COMMENT TO OFFICIAL TEXT

This section simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by will to a

person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness but to use disinterested witnesses.

An interested witness is competent to testify to prove execution of the will, under Section 3-406.

**15-2-506. Choice of law as to execution.** — A written will is valid if executed in compliance with section 15-2-502 or 15-2-503 of this Part or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national. [I.C., § 15-2-506, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Alien may take, § 15-2-112.

Choice of laws as to meaning and effect of wills, § 15-2-602.

### JUDICIAL DECISIONS

#### Applicability.

Where a decedent drafted and signed a rough copy of a will while in Idaho, this provision would not be applicable. In re Es-

tate of Buffi, 98 Idaho 354, 564 P.2d 150 (1977).

This section is a choice of laws provision dealing solely with the validity of wills made

in other jurisdictions and cannot be utilized where the question is not the validity of a foreign will. In re Estate of Buffi, 98 Idaho 354, 564 P.2d 150 (1977).

### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 55.

**C.J.S.** — 94 C.J.S., Wills, § 196.

### COMMENT TO OFFICIAL TEXT

This section permits probate of will in this state under certain conditions even if they are not executed in accordance with the formalities of Section 2-502. Such wills must be in writing but otherwise are valid if they meet the requirements for execution of the law of the place where the will is executed (when it is executed in another state or country) or the law of testator's domicile, abode or nationality at either the time of execution or at the time of death. Thus, if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the Court of this state would recognize the will as valid if the law of either state 1 or state 2 permits execution by signa-

ture alone. Or if a national of Mexico executes a written will in this state which does not meet the requirements of Section 2-502 but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators. When the Uniform Probate Code is widely adopted, the impact of this section will become minimal.

A similar provision relating to choice of law as to revocation was considered but was not included. Revocation by subsequent instruments are covered. Revocations by act, other than partial revocations, do not cause much difficulty in regard to choice of laws.

**15-2-507. Revocation by writing or by act.** — A will or any part thereof is revoked:

(a) By a subsequent will which revokes the prior will or part expressly or by inconsistency; or

(b) By being burned, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

(c) The revocation of a will executed in duplicate may be accomplished by revoking one (1) of the duplicates. [I.C., § 15-2-507, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

In general.

Contract to make will.

Holographic will.

Mental competency.

Presumption of revocation.

Sufficiency.

#### In General.

There cannot be two conflicting wills for the same estate unless the latter is a revocation of the former. *Snyder v. Raymond*, 48 Idaho 810, 285 P. 478 (1930).

#### Contract to Make Will.

A will is ordinarily revocable at any time before the testator's death, even though delivered to the person beneficially interested; but where made pursuant to a valid contract, the

testator cannot escape the obligations of the contract by revocation. *Andrews v. Aikens*, 44 Idaho 797, 260 P. 423 (1927).

### Holographic Will.

Cancellation or erasures of parts of a holographic will are permissible; and if only one clause thereof is cancelled or obliterated, such clause only is revoked. In *re Fisher's Estate*, 47 Idaho 668, 279 P. 291 (1929).

### Mental Competency.

If instrument purports to revoke prior wills, the trial court must make a finding as to mental competency of deceased at the time the revoking instrument was executed. In *re Heazle's Estate*, 72 Idaho 307, 240 P.2d 821 (1952).

### Presumption of Revocation.

Whenever new moral and testamentary duties arise subsequent to the execution of a will, the will is revoked by presumption or operation of law, unless the objects of these duties are provided for, either by the law or the will. *Morgan v. Ireland*, 1 Idaho 786.

Jurors were properly instructed that if they found that the will was left in the possession of decedent's attorney there was no presumption of revocation by the testator arising out of the failure to find it, unless they should find from the evidence that the will, after such entrustment, subsequently came into the de-

cedent's possession. In *re Killgore's Estate*, 86 Idaho 386, 387 P.2d 16 (1963).

Where a will is left in the custody of the testator, or is readily accessible to him, or is last seen in his possession, and cannot be found after his death, a presumption arises that he destroyed the will with intent to revoke it. In *re Killgore's Estate*, 86 Idaho 386, 387 P.2d 16 (1963).

### Sufficiency.

The subsequent oral declarations of the testator are not sufficient to impeach the will, although they show his dissatisfaction with the will and his intent to execute a new will. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

Instrument, written, dated and signed in handwriting of deceased which contained following statement "I revoke all former wills" was sufficient to show a revocation of prior will. In *re Heazle's Estate*, 72 Idaho 307, 240 P.2d 821 (1952).

Where a will is left in the custody of a person other than the testator and is not found after the death of the testator, there is no presumption that it was revoked. In such case oral declarations of the testator, in the absence of evidence of some act of revocation required by the statute, are not competent to prove revocation for the reason that the statute does not permit a testator orally to revoke his will. In *re Killgore's Estate*, 86 Idaho 386, 387 P.2d 16 (1963).

## RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 467 et seq.

**C.J.S.** — 95 C.J.S., Wills, § 386 et seq.

**A.L.R.** — Revocation of will as affecting codicil and vice versa. 7 A.L.R.3d 1143.

Revocation of will by nontestamentary writing. 22 A.L.R.3d 1346.

Admissibility of testator's declaration on issue of revocation of will, in his possession at time of his death, by mutilation, alteration, or cancellation. 28 A.L.R.3d 994.

Revocation of witnessed will by holographic

will or codicil, where statute requires revocation by instrument of equal formality as will. 49 A.L.R.3d 1223.

Testator's failure to make new will, following loss of original will by fire, theft, or similar casualty, as constituting revocation of original will. 61 A.L.R.3d 958.

Rights and remedies against one who induces, prevents, or interferes in the making, changing, or revoking of a will, or holds the fruits thereof. 22 A.L.R.4th 1229.

## COMMENT TO OFFICIAL TEXT

Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed. This section employs the traditional language which has been interpreted by the courts in many cases. It leaves to the Court the determination of whether a subsequent will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially, and in the case of an act done to the

document the determination of whether the act is a sufficient burning, tearing, canceling, obliteration or destruction and was done with the intent and for the purpose of revoking. The latter necessarily involves exploration of extrinsic evidence, including statements of testator as to intent.

The section specifically permits partial revocation. Each Court is free to apply its own doctrine of dependent relative revocation.

The section does not affect present law in



regard to the case of accidental destruction which is later confirmed by revocatory intention.

**15-2-508. Revocation by divorce — No revocation by other changes of circumstances.** — If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of subsection (b) of section 15-2-802 of this code. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will. [I.C., § 15-2-508, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Cross References.** — Effect of divorce, annulment, or separation decree, § 15-2-802.  
Waiver of spouse's rights by property settle-

ment in anticipation of divorce or separation, § 15-2-208.

#### JUDICIAL DECISIONS

##### **Appointment of Personal Representative.**

Decedent's will, executed at a time when former law was in effect, was not revoked by her subsequent remarriage, where her death

occurred after the effective date of the Uniform Probate Code (July 1, 1972), insofar as the appointment of a personal representative was concerned. *Shaw v. Bowman*, 101 Idaho 131, 609 P.2d 663 (1980).

#### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 550 et seq.

**C.J.S.** — 95 C.J.S., Wills, § 420.

**A.L.R.** — Divorce or annulment as affecting will previously executed by husband or

wife. 71 A.L.R.3d 1297.

Devolution of gift over upon spouse predeceasing testator where gift to spouse fails because of divorce. 74 A.L.R.3d 1108.

#### COMMENT TO OFFICIAL TEXT

The section deals with what is sometimes called revocation by operation of law. It provides for revocation by a divorce or annulment only. No other change in circumstances operates to revoke the will; this is intended to change the rule in some states that subsequent marriage or marriage plus birth of

issue operates to revoke a will. Of course, a specific devise may be adeemed by transfer of the property during the testator's lifetime except as otherwise provided in this Code; although this is occasionally called revocation, it is not within the present section. The provisions with regard to invalid divorce de-

crees parallel those in Section 2-802: Neither this section nor 2-802 includes "divorce from bed and board" as an event which affects devises or marital rights on death.

But see Section 2-204 providing that a complete property settlement entered into after or in anticipation of separation or divorce constitutes a renunciation of all benefits

under a prior will, unless the settlement provides otherwise.

Although this Section does not provide for revocation of a will by subsequent marriage of the testator, the spouse may be protected by Section 2-301 or an elective share under Section 2-201.

**15-2-509. Revival of revoked will.** — (a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under section 15-2-507 of this chapter, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

(c) Republication of a revoked will revives such will. [I.C., § 15-2-509, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 597 et seq.

**C.J.S.** — 95 C.J.S., Wills, § 429 et seq.

#### COMMENT TO OFFICIAL TEXT

This section adopts a limited revival doctrine. If testator executes will no. 1 and later executes will no. 2, revoking will no. 1 and still later revokes will no. 2 by act such as destruction, there is a question as to whether testator intended to die intestate or have will no. 1 revived as his last will. Under this section will no. 1 can be probated as testator's

last will if his intent to that effect can be established. For this purpose testimony as to his statements at the time he revokes will no. 2 or at a later date can be admitted. If will no. 2 is revoked by a third will, will no. 1 would remain revoked except to the extent that will no. 3 showed an intent to have will no. 1 effective.

**15-2-510. Incorporation by reference.** — Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification. [I.C., § 15-2-510, as added by 1971, ch. 111, § 1, p. 233.]

#### JUDICIAL DECISIONS

##### **Script Not Separate Instrument.**

In challenge to trust by on-hand relative, settlor's script was validly created pursuant to the Second Amendment and was then stapled to it, as required by new amendatory

procedures; thus, the script was not a separate instrument from the trust which would require incorporation by reference in order for it to have been valid. *Salfeety v. Seideman*, 127 Idaho 817, 907 P.2d 794 (1995).

## RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 186 et seq.

**C.J.S.** — 94 C.J.S., Wills, § 209 et seq.

**15-2-511. Testamentary additions to trusts.** — (1)(a) A will may validly devise property to the trustee of a trust established or to be established:

(i) During the testator's lifetime by the testator or by the testator and some other person or by some other person, including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts; or

(ii) At the testator's death by the testator's devise to the trustee if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust.

(b) The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

(2) Unless the testator's will provides otherwise, property devised to a trust described in subsection (1) of this section is not held under a testamentary trust of the testator but it becomes a part of the trust to which it is devised and must be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(3) Unless the testator's will provides otherwise a revocation or termination of the trust before the testator's death causes the devise to lapse. [I.C., § 15-2-511, as added by 1971, ch. 111, § 1, p. 233; am. 1999, ch. 304, § 1, p. 761; am. 2006, ch. 161, § 1, p. 481.]

## STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 161, inserted "concurrently with" in subsection (1)(a)(ii).

## JUDICIAL DECISIONS

**Cited in:** *Salfeety v. Seideman*, 127 Idaho 817, 907 P.2d 794 (1995).

## RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 196.

**A.L.R.** — "Pour-over" provisions from will to inter vivos trust. 12 A.L.R.3d 56.



## COMMENT TO OFFICIAL TEXT

**Purpose and Scope or Revisions.**

In addition to making a few stylistic changes, several substantive changes in this section are made.

As revised, it has been made clear that the “trust” need not have been established (funded with a trust res) during the decedent’s lifetime, but can be established (funded with a res) by the devise itself. The pre-1990 version probably contemplated this result and reasonably could be so interpreted (because of the phrase “regardless of the existence ... of the corpus of the trust”). Indeed, a few cases have expressly stated that statutory language like the pre-1990 version of this section authorizes pour-over devises to unfunded trusts. *E.g., Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985); *Trosch v. Maryland Nat’l Bank*, 32 Md. App. 249, 359 A.2d 564 (1976). The authority of these pronouncements is problematic, however, because the trusts in these cases were so-called “unfunded” life-insurance trusts. An unfunded life-insurance trust is not a trust without a trust res; the trust res in an unfunded life-insurance trust is the contract right to the proceeds of the life-insurance policy conferred on the trustee by virtue of naming the trustee the beneficiary of the policy. *See Gordon v. Portland Trust Bank*, 201 Or. 648, 271 P.2d 653 (1954) (“[T]he [trustee as the] beneficiary [of the policy] is the owner of a promise to pay the proceeds at the death of the insured ...”); *Gurnett v. Mutual Life Ins. Co.*, 356 Ill. 612, 191 N.E. 250 (1934). Thus, the term “unfunded life-insurance trust” does not refer to an unfunded trust, but to a funded trust that has not received additional funding. For further indication of the problematic nature of the idea that the pre-1990 version of this section per-

mits pour-over devises to unfunded trusts, *see Estate of Daniels*, 665 P.2d 594 (Colo. 1983) (pour-over devise failed; before signing the trust instrument, the decedent was advised by counsel that the “mere signing of the trust agreement would not activate it and that, before the trust could come into being, [the decedent] would have to fund it;” decedent then signed the trust agreement and returned it to counsel “to wait for further directions on it;” no further action was taken by the decedent prior to death; the decedent’s will devised the residue of her estate to the trustee of the trust, but added that the residue should go elsewhere “if the trust created by said agreement is not in effect at my death.”)

Additional revisions of this section are designed to remove obstacles to carrying out the decedent’s intention that were contained in the pre-1990 version. These revisions allow the trust terms to be set forth in a written instrument executed after as well as before or concurrently with the execution of the will; require the devised property to be administered in accordance with the terms of the trust as amended after as well as before the decedent’s death, even though the decedent’s will does not so provide; and allow the decedent’s will to provide that the devise is not to lapse even if the trust is revoked or terminated before the decedent’s death.

**Revision of Uniform Testamentary Additions to Trusts Act.**

The freestanding Uniform Testamentary Additions to Trusts Act (UTATA) was revised in 1991 in accordance with the revisions to UPC §2-511. States that enact Section 2-511 need not enact the UTATA as revised in 1991 and should repeal the original version of UTATA if previously enacted in the state.

**15-2-512. Events of independent significance.** — A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator’s death. The execution or revocation of a will of another person is such an event. [I.C., § 15-2-512, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**A.L.R.** — Validity of condition of gift depending on divorce or separation. 14 A.L.R.3d 1219.

Validity and construction of testamentary gift conditioned upon beneficiary’s remaining married. 28 A.L.R.3d 1325.

Validity of testamentary provision making

gift to person or persons meeting specified qualifications and authorizing another to determine who qualifies. 74 A.L.R.3d 1073.

Effect of and validity of provision conditioning testamentary gift upon divorce of beneficiary, or alternative provision conditioning gift upon spouse’s death. 74 A.L.R.3d 1095.

Wills: Condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith. 89 A.L.R.3d 984.

**15-2-513. Separate writing identifying bequest of tangible property.** — Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will. [I.C., § 15-2-513, as added by 1971, ch. 111, § 1, p. 233.]

#### JUDICIAL DECISIONS

##### **Gift by Memorandum.**

Decedent's gift by memorandum was properly admitted into probate as decedent's will specifically contemplated the existence of, and authorized the effectiveness of, a separate writing pursuant to the statute; the gift by memorandum described items of property

that were not specifically mentioned in the will, as well as the devisees of those items, with great specificity. *Wilkins v. Wilkins*, 137 Idaho 315, 48 P.3d 644 (2002).

**Cited in:** *Allison v. Bradley*, 107 Idaho 860, 693 P.2d 1062 (Ct. App. 1984).

#### RESEARCH REFERENCES

**C.J.S.** — 95 C.J.S., Wills, § 877.

#### COMMENT TO OFFICIAL TEXT

As part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution, this section permits a testator to refer in his will to a separate document disposing of certain tangible personalty. The separate document may be prepared after execution of the will, so would not come

within Section 2-510 on incorporation by reference. It may even be altered from time to time. It need only be either in the testator's handwriting or signed by him. The typical case would be a list of personal effects and the persons whom the testator desired to take specified items.

#### PART 6. RULES OF CONSTRUCTION

**15-2-601. Requirement that devisee survive testator by 120 hours.** — A devisee who does not survive the testator by one hundred twenty (120) hours is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will. [I.C., § 15-2-601, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Heir must survive decedent by 120 hours, § 15-2-104.

Simultaneous deaths, § 15-2-613.

### JUDICIAL DECISIONS

#### Exception to Requirement.

Provision in testator's will that "if my sister above-named does not survive me" then the contingent beneficiary should take fell under a statutory exception to this section's 120 hour survivorship requirement; thus, testa-

tor's sister, who died approximately 74 hours after his death, took under the will even though she did not survive for 120 hours. In re Estate of Kerlee, 98 Idaho 5, 557 P.2d 599 (1976).

### RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, §§ 1192, 1193.

**C.J.S.** — 96 C.J.S., Wills, § 1052 et seq.

**A.L.R.** — Construction of provision as to

which of two or more parties shall be deemed the survivor in case of death simultaneously, in a common disaster, or within a specified period of time. 40 A.L.R.3d 359.

### COMMENT TO OFFICIAL TEXT

[General comment to §§ 15-2-601 — 15-2-615.]

Part 6 deals with a variety of construction problems which commonly occur in wills. All of the "rules" set forth in this part yield to a contrary intent expressed in the will and are therefore merely presumptions. Some of the sections are found in all states, with some variation in wording; others are relatively new. The sections deal with such problems as death before the testator (lapse), the inclusiveness of the will as to property of the testator, effect of failure of a gift in the will,

change in form of securities specifically devised, ademption by reason of fire, sale and the like, exoneration, exercise of power of appointment by general language in the will, and the kinds of persons deemed to be included within various class gifts which are expressed in terms of family relationships.

#### [Comment to § 15-2-601.]

This parallels Section 2-104 requiring an heir to survive by 120 hours in order to inherit.

**15-2-602. Choice of law as to meaning and effect of wills.** — The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the provisions relating to the elective share described in 15-2-201 through 15-2-209[, Idaho Code], the provisions relating to the exempt property and allowances described in 15-2-401 through 15-2-405[, Idaho Code,] or any other public policy of this state otherwise applicable to the disposition. [I.C., § 15-2-602, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 6, p. 510; am. 2001, ch. 294, § 7, p. 1036.]

### STATUTORY NOTES

**Cross References.** — Choice of law as to execution, § 15-2-506.



## RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 993 et seq.

**C.J.S.** — 94 C.J.S., Wills, §§ 196, 826 et seq.

## COMMENT TO OFFICIAL TEXT

New York Estates, Powers & Trusts Law Sec. 3-5.1(h) and Illinois Probate Act Sec. 896(b) direct respect for a testator's choice of local law with reference to personal and intangible property situated in the enacting state. This provision goes further and enables a testator to select the law of a particular state for purposes of interpreting his will without regard to the location of property covered thereby. So long as local public policy is accommodated, the section should be ac-

cepted as necessary and desirable to add to the utility of wills. Choice of law regarding formal validity of a will is in Sec. 2-506. See also Sections 3-202 and 3-408.

In 1975, the Joint Editorial Board recommended the addition of explicit reference to the elective share described in Article II, Part 2, and the exemptions and allowances described in Article II, Part 4, as embodying policies of this state which may not be circumvented by a testator's choice of applicable law.

**15-2-603. Rules of construction and intention.** — The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this Part apply unless a contrary intention is indicated by the will. [I.C., § 15-2-603, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Choice of law as to execution, § 15-2-506.

## JUDICIAL DECISIONS

## ANALYSIS

Holographic will.  
Judicially created rules.  
Survival clause.

**Holographic Will.**

When language in a holographic will is deleted or added to, a new will results, consisting only of the remaining and new language; if the remaining language in the will clearly expresses the testatrix's intent, a court may not consider the deleted language to alter that intent or to render that intent ambiguous. *Allison v. Bradley*, 107 Idaho 860, 693 P.2d 1062 (Ct. App. 1984).

**Judicially Created Rules.**

If the testator's intent can be determined from the face of his will, that intent, unless it is in contravention of some established rule of law or public policy, must be given effect; judicially created rules of construction may

only be used as an aid in ascertaining the testator's intent, if that intent cannot be ascertained from reading of the will itself. *Allen v. Shea*, 105 Idaho 31, 665 P.2d 1041 (1983).

**Survival Clause.**

A clause in a will which made a bequest to a legatee "provided he survive distribution thereof to him" was determined to mean that legatee was required to survive an order of the court approving the transfer or a final settlement or closing of the estate. *Hintze v. Black*, 125 Idaho 655, 873 P.2d 909 (Ct. App. 1994).

**Cited in:** *Howard v. Estate of Howard*, 112 Idaho 306, 732 P.2d 275 (1987).

## DECISIONS UNDER PRIOR LAW

**In General.**

To ascertain the meaning of a testator, in construing a will, the cardinal rule of construction is to ascertain the testator's intent; intent is ascertained by a full view of everything within the four corners of the instrument. *Jones v. Broadbent*, 21 Idaho 555, 123 P. 476 (1912).

Where the testator's intent is clearly and unequivocally expressed, rules of construction need not be employed. *Ohms v. Church of the Nazarene*, 64 Idaho 262, 130 P.2d 679 (1942).

**RESEARCH REFERENCES**

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1008.

**C.J.S.** — 95 C.J.S., Wills, § 831 et seq.

**A.L.R.** — What passes under legacy or bequest of things found or contained in particular place or container. 5 A.L.R.3d 466.

Meaning of term "relatives" or "relations" employed in will. 5 A.L.R.3d 715.

Validity, construction, and effect of bequest or devise to a person's estate, or to the person or his estate. 10 A.L.R.3d 483.

Validity and construction of gift to A or B, or to A or B or survivor. 19 A.L.R.3d 1213.

Admissibility of extrinsic evidence to determine whether fee or absolute interest, or only estate for life or years, was given. 21 A.L.R.3d 778.

What passes under term "securities" in will. 27 A.L.R.3d 1386.

What passes under terms "cash," "cash on hand," or "cash assets" in will. 27 A.L.R.3d 1406.

What passes under term "business" or "business enterprise" in will. 28 A.L.R.3d 1169.

What included in devise of "house," "dwelling house," or the like. 29 A.L.R.3d 574.

What passes under, and is included in, devise of "building," "house," or "dwelling house." 29 A.L.R.3d 574.

What passes under terms "personal belongings," "belongings," "personal effects" or "effects" in will. 30 A.L.R.3d 797.

Who takes under testamentary gift to "parents." 36 A.L.R.3d 323.

Construction of provision as to which of two or more persons shall be deemed the survivor in case of death simultaneously, in a common disaster, or within a specified period of time. 40 A.L.R.3d 359.

Word "grandchild" or "grandchildren" in will as including great-grandchild or great-grandchildren. 51 A.L.R.3d 1250.

Construction and operation of will or trust provision appointing advisors to trustee or executor. 56 A.L.R.3d 1249.

Validity and construction of bequest with limitation over to another in event that original beneficiary dies before distribution, payment, or receipt thereof. 59 A.L.R.3d 1043.

Construction of reference in will to statute where pertinent provisions of statute are subsequently changed by amendment or repeal. 63 A.L.R.3d 603.

Effect of doubtful construction of will devising property upon marketability of title. 65 A.L.R.3d 450.

Construction and effect of will provisions relied on as affecting payment of real or personal property taxes or income taxes. 70 A.L.R.3d 726.

Taxation, construction and effect of provisions of will relied upon as affecting the burden of. 70 A.L.R.3d 630.

What passes under term "personal property" in will. 31 A.L.R.5th 499.

**15-2-604. Construction that will passes all property — After-acquired property.** — A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will. [I.C., § 15-2-604, as added by 1971, ch. 111, § 1, p. 233.]

**JUDICIAL DECISIONS**

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Intent of testator.

Residuary clause.

**Intent of Testator.**

Under the statute all after-acquired property, whether real or personal, passes under the will of the testator unless a contrary intent is expressed in the will. In re Hartwig's Estate, 70 Idaho 77, 211 P.2d 399 (1949).

**Residuary Clause.**

Use of the words, "remainder of my said estate", in the residuary clause of the will passed all property owned by the testator at the time of his death, including property acquired from his wife since the date of his will. In re Hartwig's Estate, 70 Idaho 77, 211 P.2d 399 (1949).

Where testator under will bequeathed one-half of his estate to his wife as her interest in their community property, and under terms of residuary clause gave all the rest, residue, and remainder of his property to two of his children, and thereafter wife died intestate prior to death of the testator, the court held that all of his property, real estate and personal, at the time of his death passed to the legatees under the residuary clause. In re Hartwig's Estate, 70 Idaho 77, 211 P.2d 399 (1949).

**RESEARCH REFERENCES**

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1165 et seq.

**C.J.S.** — 94 C.J.S., Wills, §§ 55, 56.  
96 C.J.S., Wills, § 1099 et seq.

**A.L.R.** — Effect of residuary clause to pass property acquired by testator's estate after his death. 39 A.L.R.3d 1390.

**15-2-605. Anti-lapse — Deceased devisee — Class gifts.** — If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by one hundred twenty (120) hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will. [I.C., § 15-2-605, as added by 1971, ch. 111, § 1, p. 233.]

**RESEARCH REFERENCES**

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1448.

**C.J.S.** — 96 C.J.S., Wills, § 1809 et seq.

**A.L.R.** — Anti-lapse statute as applicable if interest beneficiary under inter vivos trust predeceases life-tenant settlor. 47 A.L.R.3d 358.

Gift over to "survivors" of class or group of designated beneficiaries as restricted to surviving members of class or group, or as passing to heirs or representatives of deceased beneficiary. 54 A.L.R.3d 280.

**COMMENT TO OFFICIAL TEXT**

This section prevents lapse by death of a devisee before the testator if the devisee is a relative and leaves issue who survives the testator. A relative is one related to the testator by kinship and is limited to those who can inherit under Section 2-103 (through grandparents); it does not include persons related by marriage. Issue include adopted persons and illegitimates to the extent they would inherit from the devisee; see Section 1-201 and 2-109. Note that the section is broader than some existing anti-lapse statutes which

apply only to devises to children and other descendants, but is narrower than those which apply to devises to any person. The section is expressly applicable to class gifts, thereby eliminating a frequent source of litigation. It also applies to the so-called "void" gift, where the devisee is dead at the time of execution of the will. This, though contrary to some decisions, seems justified. It still seems likely that the testator would want the issue of a person included in a class term but dead when the will is made to be treated like the



issue of another member of the class who was alive at the time the will was executed but who died before the testator.

The five day survival requirement stated in Section 2-601 does not require issue who would be substituted for their parent by this

section to survive their parent by any set period.

Section 2-106 describes the method of division when a taking by representation is directed by the Code.

**15-2-606. Failure of testamentary provision.** — (a) Except as provided in section 15-2-605 of this Part, if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.

(b) Except as provided in section 15-2-605 of this Part, if the residue is devised to two (2) or more persons and the share of one (1) of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue. [I.C., § 15-2-606, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### Conditions Precedent.

Finding in favor of the beneficiary in a will contest action was improper where the partnership terminated by operation of law when the testator died; under subsection (a), the ownership devise failed because it did not

satisfy the conditions precedent and, under Idaho law, any devise that failed became part of the residue. *Steelsmith v. Trout* (In re Estate of Steelsmith), 139 Idaho 216, 76 P.3d 960 (2003).

### COMMENT TO OFFICIAL TEXT

If a devise fails by reason of lapse and the conditions of Section 2-605 are met, the latter section governs rather than this section. There is also a special rule for renunciation

contained in Section 2-801; a renounced devise may be governed by either Section 2-605 or the present section, depending on the circumstances.

**15-2-607. Change in securities — Accessions — Nonademption.** — (a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

- (1) as much of the devised securities as is a part of the estate at the time of the testator's death;
- (2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;
- (3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and
- (4) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) of this section are not part of the specific devise. [I.C., § 15-2-607, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1307.  
**A.L.R.** — Bequest of bank deposits, stocks,

bonds, notes, or other securities as carrying dividends or interest accruing between testa-

tor's death and payment of legacy. 15 A.L.R.3d 1038.

Admissibility of extrinsic evidence to identify stock, bonds, and other securities dis-

posed of by will. 16 A.L.R.3d 432.

Change in stock or corporate structure, or split or substitution of stock of corporation, as affecting bequest of stock. 46 A.L.R.3d 7.

### COMMENT TO OFFICIAL TEXT

The Joint Editorial Board considered amending Subsection (a)(2) so as to exclude additional securities of the same entity that were not acquired by testator as a result of his ownership of the devised securities. It concluded that, in context, the present language is clear enough to make the proposed amendment unnecessary.

Subsection (b) is intended to codify existing law to the effect that cash dividends declared and payable as of a record date occurring before the testator's death do not pass as a part of the specific devise even though paid after death. See Section 4, Revised Uniform Principal and Income Act.

**15-2-608. Nonademption of specific devises in certain cases — Unpaid proceeds of sale, condemnation or insurance — Sale by conservator.** — (a) A specified devisee has the right to the remaining specifically devised property and:

- (1) Any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property;
- (2) Any amount of a condemnation award for the taking of the property unpaid at death;
- (3) Any proceeds unpaid at death on fire or casualty insurance on the property; and
- (4) Property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

(b) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not apply if subsequent to the sale, condemnation or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one (1) year. The right of the specific devisee, under this subsection is reduced by any right he has under subsection (a) of this section. [I.C., § 15-2-608, as added by 1978, ch. 350, § 9, p. 914.]

### STATUTORY NOTES

**Prior Laws.** — Former § 15-2-608, which comprised I.C., § 15-2-608, as added by 1971, ch. 111, § 1, p. 233 was repealed by S.L. 1978, ch. 350, § 8.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

### COMMENT TO OFFICIAL TEXT

In 1975, the Joint Editorial Board recommended a re-ordering of the title of this section and a reversal of the original order of the subsections. This recommendation was de-

signed to correct an unintended interpretation of the section to the effect that all of the events described in subsections (a) and (b) had relevance only when the testator was

under a conservatorship. The original intent of the section, made more apparent by this re-ordering, was to prevent ademption in all cases involving sale, condemnation or de-

struction of specifically devised assets where testator's death occurred before the proceeds of the sale, condemnation or any insurance, had been paid to the testator.

**15-2-609. Nonexoneration.** — A specific devise passes subject to any security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts. [I.C., § 15-2-609, as added by 1971, ch. 111, § 1, p. 233.]

#### COMMENT TO OFFICIAL TEXT

See Section 3-814 empowering the personal representative to pay an encumbrance under some circumstances; the last sentence of that section makes it clear that such payment does not increase the right of the specific devisee. The present section governs the substantive

rights of the devisee. The common law rule of exoneration of the specific devise is abolished by this section, and the contrary rule is adopted.

For the rule as to exempt property, see Section 2-402.

**15-2-610. Exercise of power of appointment.** — A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power. [I.C., § 15-2-610, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 62 Am. Jur. 2d, Powers of Appointment and Alienation, § 81 et seq.

**C.J.S.** — 72 C.J.S., Powers, §§ 16, 28, 29.

**A.L.R.** — Effect of statute upon determina-

tion whether disposition of all or residue of testator's property, without referring to power of appointment, sufficiently manifests intention to exercise power. 16 A.L.R.3d 911.

#### COMMENT TO OFFICIAL TEXT

Although there is some indication that more states will adopt special legislation on powers of appointment, and this Code has therefore generally avoided any provisions relating to powers of appointment, there is great need for uniformity on the subject of exercise by a will purporting to dispose of all of the donee's property, whether by a standard residuary clause or a general recital of property passing under the will. Although a substantial number of states have legislation to the effect that a will with a general residuary clause does manifest an intent to exercise a power, the contrary rule is stated in the present section for two reasons: (1) this is still the majority rule in the United States, and (2) most powers of appointment are created in

marital deduction trusts and the donor would prefer to have the property pass under his trust instrument unless the donee affirmatively manifests an intent to exercise the power.

Under this section and Section 2-603 the intent to exercise the power is effective if it is "indicated by the will." This wording permits a Court to find the manifest intent if the language of the will interpreted in light of all the surrounding circumstances shows that the donee intended an exercise, except, of course, if the donor has conditioned exercise on an express reference to the original creating instrument. In other words, the modern liberal rule on interpretation of the donee's will would be available.

**15-2-611. Construction of generic terms to accord with relationships as defined for intestate succession.** — Half bloods, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining



relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father. [I.C., § 15-2-611, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1218.

### COMMENT TO OFFICIAL TEXT

The purpose of this section is to facilitate a modern construction of gifts, usually class gifts, in wills.

**15-2-612. Ademption by satisfaction.** — Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first. [I.C., § 15-2-612, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Advancements, § 15-2-110.

### RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1458 et seq.

**C.J.S.** — 96 C.J.S., Wills, § 1762 et seq.

**A.L.R.** — Ademption of bequest of proceeds of property. 45 A.L.R.3d 10.

Rule of ademption as applied to legacies of proceeds of life insurance. 45 A.L.R.3d 10.

What amounts to ademption of legacy of

corporate stock or other corporate securities. 46 A.L.R.3d 7.

Ademption of legacy of business or interest therein. 65 A.L.R.3d 541.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator, or trustee of mentally or physically incompetent testator. 84 A.L.R.4th 462.

### COMMENT TO OFFICIAL TEXT

This section parallels Section 2-110 on advancements and follows the same policy of requiring written evidence that lifetime gifts are to be taken into account in distribution of an estate, whether testate or intestate. Although Courts traditionally call this “ademption by satisfaction” when a will is involved, and “advancement” when the estate is intestate, the difference in terminology is not significant. Some wills expressly provide for lifetime advances by a hotchpot clause. Where the will is silent, the above section

would require either the testator to declare in writing that the gift is an advance or satisfaction or the devisee to acknowledge the same in writing. The second sentence on value accords with Section 2-110 and would apply if property such as stock is given. If the devise is specific, a gift of the specific property during lifetime would adeem the devise by extinction rather than by satisfaction, and this section would be inapplicable. If a devisee to whom an advancement is made predeceases the testator and his issue take under 2-605, they

take the same devise as their ancestor; if the devise is reduced by reason of this section as to the ancestor, it is automatically reduced as

to his issue. In this respect the rule in testacy differs from that in intestacy; see Section 2-110.

**15-2-613. Simultaneous death — Disposition of property.** — Subject to extension by the provisions of section 15-2-104 and section 15-2-601 of this code, where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be distributed as if he had survived, except as otherwise provided in this section.

(a) Where two (2) or more beneficiaries are designated to take successively by reason of survivorship under another person's distribution of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.

(b) Where there is no sufficient evidence that two (2) joint tenants have died otherwise than simultaneously, the property so held shall be distributed one-half (1/2) as if one had survived and one-half (1/2) as if the other had survived. If there are more than two (2) joint tenants and all of them have so died, the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

(c) Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

(d) This section shall not apply in the case of wills, living trusts, deeds, or contracts of insurance, wherein provision has been made for distribution of property different from the provisions of the section.

(e) This section shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it.

(f) This section may be cited as the "uniform simultaneous death act." [I.C., § 15-2-613, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Application of section.

Evidence of survival.

Purpose.

Time limit.

#### Application of Section.

Where there is sufficient evidence to determine that one party survived another, the simultaneous death statute, providing for dis-

tribution of property of joint tenants or tenants by the entirety, is not applicable. In re Davenport's Estates, 79 Idaho 548, 323 P.2d 611 (1958).

**Evidence of Survival.**

Where trial court was faced with conflicting evidence of a substantial nature, it had to resolve the conflict and, in doing so, stated in the findings of fact that the wife had lived for a period of approximately 15 minutes, surviving her husband following the time of automobile collision in petition brought for distribution by the administrator who had set forth the names of all heirs, both husband's and wife's. In *re* Davenport's Estates, 79 Idaho 548, 323 P.2d 611 (1958).

**Purpose.**

The purpose of the former similar section was to prevent what was deemed a wrong and injustice to those who should naturally be the

recipients of the bounty of a testator — his heirs at law. It was not enacted for the public good or as a matter of state policy, but for the benefit exclusively of those named in it — the heirs at law — and as a protection against hasty and improvident gifts to charity by a testator of his entire estate to the exclusion of those who, in the judgment of the legislature, had a better claim to his bounty. In *re* Coleman's Estate, 66 Idaho 567, 163 P.2d 847 (1945).

**Time Limit.**

Testator's death within 30 days after devise to be used for relief and treatment of crippled children voided bequest. In *re* Coleman's Estate, 66 Idaho 567, 163 P.2d 847 (1945).

**RESEARCH REFERENCES**

**A.L.R.** — Construction, application, and effect of Uniform Simultaneous Death Act. 39 A.L.R.3d 1332.

**15-2-614. Effect of devise.** — Every devise in any will conveys all of the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a lesser estate. [I.C., § 15-2-614, as added by 1971, ch. 111, § 1, p. 233.]

**15-2-615. Restriction on charitable devises. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 15-2-615, as added by 1971, ch. 111, § 1, p. 233; am. 1978, ch. 286, § 1, p.

696, was repealed by S.L. 1994, ch. 359, § 1, effective July 1, 1994.

**15-2-616. Restriction on devises to nursing home or residential or assisted living facility operators.** — A devise or bequest involving either real or personal property, directly or indirectly, to any person who owns, operates or is employed at a nursing home, residential or assisted living facility or any home, including the testator's home, whether or not licensed, in which the testator was a resident within one (1) year of his death shall be presumed to have been the result of undue influence, rebuttable by clear and convincing evidence. This section shall apply to all property passing by testate succession after July 1, 1983, regardless of when the will was written; provided, this section shall in no way limit or affect the rights of a beneficiary who is related to the testator, or who is a charitable or benevolent society or corporation; provided further that the foregoing limitations shall not apply to wills of persons whose death is caused by accidental means and whose wills are executed prior to the accident which results in death. [I.C., § 15-2-616, as added by 1983, ch. 236, § 1, p. 642; am. 1989, ch. 193, § 1, p. 475; am. 1994, ch. 350, § 1, p. 1110; am. 2000, ch. 274, § 1, p. 799.]



## PART 7. CONTRACTUAL ARRANGEMENTS RELATING TO DEATH

**15-2-701. Contracts concerning succession.** — A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this act, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills. [I.C., § 15-2-701, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

**Determination of Multiple Issues.**

Trial court and the parties mistakenly believed that the contract establishing the survivor's estate contained provisions relating to the determination of the beneficiary's entitlement, and, because there was confusion regarding what expenses, particularly attorney fees, could be deducted from his share, the judge handling the probate was best positioned to determine the net share of any

estate beneficiary, considering all expenses, the overall scheme of distribution, and the effect of one beneficiary's entitlement upon that of the others; by following the intent of the applicable statutes and rules pertaining to assignment of probate proceedings to the magistrate division, confusion could be averted or alleviated. *Miller v. Estate of Prater*, 141 Idaho 208, 108 P.3d 355 (2005).

## DECISIONS UNDER PRIOR LAW

**Marriage Contract.**

A conveyance after marriage by testator to his wife of 80 acres of land failed to constitute proof of consummation of a marriage contract contemplated by statute as sufficient to be

received to rebut the presumption of revocation of an antenuptial will. *White v. Conference Claimants Endowment Comm'n*, 81 Idaho 17, 336 P.2d 674 (1959).

## RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 312 et seq.

**C.J.S.** — 94 C.J.S., Wills, § 133 et seq.

**A.L.R.** — Acceptance of benefits under will as election precluding enforcement of contract right as to property bequeathed. 60 A.L.R.3d 1147.

Measure of damages for breach of contract to will property. 65 A.L.R.3d 632.

Right of party to joint or mutual will, made pursuant to agreement as to disposition of property at death, to dispose of such property during life. 85 A.L.R.3d 8.

## COMMENT TO OFFICIAL TEXT

It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the material provisions of the

contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

## PART 8. GENERAL PROVISIONS

**15-2-801. Renunciation.** — (a)(1) A person or the representative of an incapacitated or unascertained person who is an heir, devisee, person succeeding to a renounced interest, donee, beneficiary under a testamentary or nontestamentary instrument, donee of a power of appointment, grantee, surviving joint owner or surviving joint tenant, beneficiary of an insurance contract, person designated to take pursuant to a power of appointment exercised by a testamentary or nontestamentary instrument, or otherwise the recipient of any benefit under a testamentary or nontestamentary instrument, may renounce in whole or in part, powers, future interests, specific parts, fractional shares or assets thereof by filing a written instrument within the time and at the place hereinafter provided.

(2) The instrument shall: (i) describe the property or interest renounced; (ii) be signed by the person renouncing; and (iii) declare the renunciation and the extent thereof.

(3) The appropriate court may direct or permit a trustee under a testamentary or nontestamentary instrument to renounce or to deviate from any power of administration, management or allocation of benefit upon finding that exercise of such power may defeat or impair the accomplishment of the purposes of the trust whether by the imposition of tax or the allocation of beneficial interest inconsistent with such purposes. Such authority shall be exercised after hearing and upon notice to all known persons beneficially interested in such trust or estate, in the manner provided by this act.

(b) The writing specified in subsection (a) of this section must be filed within nine (9) months after the transfer or the death of the decedent, or donee of the power, (whichever is the later) or, if the taker of the property is not then finally ascertained, not later than nine (9) months after the event that determines that the taker of the property or interest is finally ascertained or his interest indefeasibly vested. The writing must be filed in the court of the county where proceedings concerning the decedent's estate are pending, or where they would be pending if commenced. If an interest in real estate is renounced, a copy of the writing may also be recorded in the office of the recorder in the county in which said real estate lies. A copy of the writing also shall be delivered in person or mailed by registered or certified mail to the personal representative of the decedent, the trustee of any trust in which the interest renounced exists, and no such personal representative, trustee, or person shall be liable for any otherwise proper distribution or other disposition made without actual notice of the renunciation.

(c) Unless the decedent or donee of the power has otherwise indicated, the property or interest renounced passes as if the person renouncing had predeceased the decedent, or if the person renouncing is designated to take under a power of appointment as if the person renouncing had predeceased the donee of the power. A future interest that takes effect in possession or enjoyment after the termination of the estate or interest renounced takes effect as if the person renouncing had predeceased the decedent or the donee of the power. In every case the renunciation relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

(d) The right to renounce property or an interest therein is barred by: (1) assignment, conveyance, encumbrance, pledge or transfer of property therein or any contract therefor; (2) written waiver of the right to renounce; or (3) sale or other disposition of property pursuant to judicial process, made before the renunciation is effective.

(e) The right to renounce granted by this section exists irrespective of any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction.

(f) The renunciation or the written waiver of the right to renounce is binding upon the person renouncing or person waiving and all persons claiming through or under him.

(g) This section does not abridge the right of any person to assign, convey, release, or renounce any property or an interest therein arising under any other statute.

(h) An interest in property existing on the effective date of this act as to which, if a present interest, the time for filing a renunciation has not expired, or, if a future interest, the interest has not become indefeasibly vested or the taker finally ascertained may be renounced within nine (9) months after the effective date of this act.

(i) In clarification and amplification of subsection (a)(1) of this section, and to make clear the existing terms thereof, a renunciation may be made by an agent appointed under a power of attorney, by a conservator or guardian on behalf of an incapacitated person, or by the personal representative or administrator of a deceased person. The ability to renounce on behalf of the person does not need to be specifically set forth in a power of attorney if the power is general in nature. [I.C., § 15-2-801, as added by 1978, ch. 173, § 2, p. 395; am. 2000, ch. 182, § 1, p. 450.]

#### STATUTORY NOTES

**Cross References.** — Private agreements among successors to bind personal representatives, § 15-3-912.

**Prior Laws.** — Former § 15-2-801, which comprised I.C., § 15-2-801, as added by 1971, ch. 111, § 1, p. 233 was repealed by S.L. 1978, ch. 173, § 1.

**Compiler's Notes.** — The term "this act," appearing at the end of paragraph (a)(3), refers to S.L. 1978, ch. 173, which is codified as this section.

The phrase "effective date of this act", appearing twice in subsection (h), refers to the effective date of S.L. 1978, ch. 173, March 20, 1978.

The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 3 of S.L. 1978, ch. 173 declared an emergency. Approved March 20, 1978.

#### RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 157 et seq.  
80 Am. Jur. 2d, Wills, § 1359.

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 69.  
96 C.J.S., Wills, § 1713 et seq.



## COMMENT TO OFFICIAL TEXT

**[General comment to §§ 15-2-801 — 15-2-803.]**

Part 8 contains three general provisions which cut across both testate and intestate succession. The first section permits renunciation; the existing law in most states permits renunciation of gifts by will but not by intestate succession, a distinction which cannot be defended on policy grounds. The second section deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share. The last section, an optional provision, spells out the legal consequence of murder on the right of the murderer to take as heir, devisee, joint tenant or life insurance beneficiary.

**[Comment to Subsection (a).]**

*Who May Disclaim:* At common law it was settled that the taker of property under a will had the right to accept or reject a legacy or devise (per Abbott, C.J. in *Townson v. Tickell*, 3 B & Ald 3, 136, 106 Eng. Rep. 575, 576). The same rule prevails in the United States (*Peter v. Peter*, 343 Ill. 493, 175 N.E. 846 (1931) 75 A.L.R. 890). It is said that no one can make another an owner of an estate against his consent by devising it to him. See, for example, *People v. Flanagan*, 331 Ill. 203, 162 N.E. 848 (1928) 60 A.L.R. 305:

"The law is clear that a legatee or devisee is under no obligation to accept a testamentary gift . . . and he may renounce the gift, by which act the estate will descend to the heir or pass in some other direction under the will . . ."

Under the rule permitting the disclaimer of testate successions, the disclaimed interest related back to the date of the testator's death so that the interest did not vest in the grantee but remained in the original owner as if the will had never been executed (*People v. Flanagan*, supra).

Unlike the devisee or legatee, an heir had no common law power to prevent passage of title to himself by disclaimer. "An heir at law is the only person in whom the law of England vests property, whether he will or not," declares Williams on Real Property, and adds, "No disclaimer that he may make will have any effect, though, of course, he may as soon as he pleases dispose of the property by ordinary conveyance." (Williams on Law of Real Property 75 [2d Am. Ed. 1857]. See also 6 Page on Wills [Bowe-Parker Revision] Section 49.1.)

The difference between testate and intestate successions in respect to the right to disclaim has produced a number of illogical and undesirable consequences. An heir who sought to reject his inheritance was subjected

to the Federal gift tax on the theory that since he could not prevent the passage of title to himself, any act done to rid himself of the interest necessarily involved a transfer subject to gift tax liability [*Hardenberg v. Com'r*, 198 F.2d 63 (8th Cir.) cert. denied, 344 U.S. 863 (1952) aff'g 17 T.C. 166 (1951); *Maxwell v. Com'r*, 17 T.C. 1589 (1952). See Lauritzen, Only God Can Make an Heir, 48 NW Rev. 568; Annotation 170 A.L.R. 435]. On the other hand, a legatee or devisee who rejected a legacy or devise under the will incurred no such tax consequences [*Brown v. Routzahn*, 63 F.2d 914 (6th Cir.) cert. denied, 290 U.S. 641 (1933)].

Subsection (a) places an heir on the same basis as a devisee or legatee and provides that he and others upon whom successions may devolve, have the full right to disclaim in whole or in part the passage of property to them, with the same legal consequences applying in all such cases.

Successive disclaimers are permitted by the express inclusion of "person succeeding to a disclaimed interest" among those who may disclaim.

*Beneficiary:* The term beneficiary is used in a broad sense to include any person entitled, but for his disclaimer, to possess or enjoy an equitable or legal interest, present or future, in the property or interest, including a power to consume, appoint, or apply it for any purpose or to enforce the transfer in any respect.

Subsection (a) extends the right to disclaim to the representative of an incapacitated or protected person. This accords with the general rule that the probate or surrogate court in the exercise of its traditional jurisdiction over the person and estate of a minor or incompetent may authorize or direct the guardian, conservator or committee to exercise the right on behalf of his ward when it is in the ward's interest to do so. *Davis v. Mather*, 309 Ill. 284, 141 N.E. 209 (1923).

On the other hand, absent a statute, the general rule is that the right to disclaim is personal to the person entitled to exercise it, and dies with him in the absence of fraud or concealment or conflict of interest of his representative, even though the time within which the right might have been utilized has not expired and even though he may be incompetent. *Rock Island Bank & Trust Co. v. First Nat. Bank of Rock Island*, 26 Ill. 2d 47, 185 N.E.2d 890 (1962), 3 A.L.R.3d 114. Subsection (a) adopts this position by stating that the right to disclaim does not survive the death of the person having it.

The Act makes no provision here or elsewhere, for an extension of time to disclaim or other relief from a strict observance of the statutory requirements for disclaimer and the

time limitations for expressing the right of disclaimer apply to persons under disability as well as to others.

*What May be Disclaimed:* Subsection (a) specifies that the "succession" to any property, real or personal or interest therein, may be disclaimed, and it is immaterial whether it derives by way of will, intestacy, exercise of a power of appointment or disclaimer. It would include the right to renounce any survivorship interest in the community in a community property state. Cf. *U.S. v. Mitchell*, 403 U.S. 190 (1971), rev'g 430 F.2d (5th Cir. 1970), aff'g 51 T.C. 641 (1969).

*Future Interests:* Subsection (a) contemplates the disclaimer of future interests by reference to "beneficiary under a testamentary instrument" and "appointee under a power of appointment." The time for making such a disclaimer is dealt with in Subsection (b).

*Partial Disclaimer:* The status of partial disclaimers has been uncertain in many states. The result has often turned on whether the gift is "severable" or constitutes a "single, aggregate" gift [*Olgesby v. Springfield Marine Bank*, 395 Ill. 37, 69 N.E.2d 269 (1946); *Brown v. Routzahn*, supra]. Subsection (a) makes it clear that a partial, as well as a total, disclaimer is permitted.

Discretionary administrative and investment powers under a trust have been held to constitute a "severable" interest and subject to partial disclaimer. *Estate of Harry C. Jaecker*, 58 T.C. 166, CCH Dec. 31, 356 (1972).

*Method of Disclaiming:* In many states no satisfactory case law has existed as to the form and manner of making disclaimers of devises or legacies under wills. See Annotation 93 A.L.R.2d 8 — What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Bequest or Devise. Because certainty of titles and the expeditions administration of estates makes definiteness desirable in this area. Subsection (a) requires a disclaimer to (i) describe the property or interest disclaimed; (ii) declare the disclaimer and the extent thereof; and (iii) be signed by the disclaimant.

#### [Comment to Subsection (b).]

*Time for Making Disclaimer:* At common law, no specific time evolved within which disclaimer had to be made. The only requirement was that it be within a "reasonable" time (*In re Wilson's Estate*, 298 N.Y. 398, 83 N.E.2d 852 (1949); *Ewing v. Rountree*, 228 F. Supp. 137 (D.C. Tenn. 1964)). As a result, divergent holdings were reached by the courts (*Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933)). Subsection (b) fixes a definite time for filing of disclaimers. This approach follows the pattern of the Federal estate tax law which prescribed the

time for filing estate tax returns in terms of the decedent's death. The time allowed should overlast the time for filing claims and contesting the will and enable the executor or administrator to know with certainty who the takers of the estate will be. On the other hand, it should not be so long as to work against an early determination of the acceptance or rejection of succession to an estate, or increase the risk of inadvertent acceptance of the benefits of the property, creating an estoppel. In the case of future interests the disclaimer period should run from the time the takers of the interest are finally ascertained and their interest indefeasibly fixed. *Seifner v. Weller*, 171 S.W.2d 617 (Mo. 1943). For the consequence of selecting too short a period, see *Brodhag v. U.S.*, 319 F. Supp. 747 (S.D. W.Va. 1970) involving a 2-month period fixed by West Virginia law.

In the case of future interests it should be noted that the person need not wait until the occurrence of the determinative event before filing a disclaimer, but may do so at any time after the death of the decedent or donee, so long as it is made "not later than" the prescribed period.

*Federal Gift Tax Implications:* Disclaimers have significance under the Federal gift tax law. Section 2511(a) of the Internal Revenue Code imposes a gift tax upon the transfer of property by gift whether the transfer is in trust or otherwise, and whether the gift is direct or indirect. The Treasury regulations under this section state that where local law gives the beneficiary, heir or next-of-kin an unqualified right to refuse to accept ownership of property transferred from a decedent, whether by will or by intestacy, a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a "reasonable time" after knowledge of the existence of the transfer.

A "reasonable time" for gift tax purposes is not defined in the Code or regulations. It has been held that the courts will look to the law of the states in determining the questions. *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933), not conclusively, but as relevant and having probative value (*Keinath v. C.I.R.*, 480 F.2d 57 (8th Cir. 1973), rev'g, 58 T.C. 352 (1972)), and that an unequivocal disclaimer filed within 6 months of the determinative event is made within a "reasonable time." It has been held, further, that as regards future interests, the "reasonable time" period runs from the termination of the preceding estate or interest, and not from the time the transfer was made, *Keinath v. C.I.R.*, supra.

*Place of Filing Disclaimer:* Subsection (b) requires a disclaimer to be filed in the probate court. If real property or an interest therein is involved, a copy of the disclaimer may also be



recorded in the office of the recorder of deeds or other appropriate office in the county in which the real estate is situated. If the Torrens system is in effect, appropriate provisions should be added to comply with local law.

**Notice:** A copy of the disclaimer is required to be delivered in person or mailed by registered or certified mail to the personal representative of other fiduciary of the decedent or of the donee of the power as the case may be.

#### [Comment to Subsection (c).]

**Devolution of Disclaimed Property:** When a beneficiary disclaimed his interest under a will, the question arises as to what happens to the rejected interest. In *People v. Flanagan*, 331 Ill. 203, 162 N.E. 848 (1928), 60 A.L.R. 305, the court, quoting the New York case of *Burritt v. Sillman*, 13 N.Y. 93 (1855) said that the disclaimed property will “descend to the heir or pass in some other direction under the will.” From this, it may be assumed that the court meant that if the decedent left no will, the renounced interest passed according to the rules of descent, but if he left a will, it passed according to its terms.

It has been generally thought that devolution in the case of disclaimer should be the same as in the case of lapse, which is controlled by sections of the probate law. Subsection (c) takes this approach. It provides that unless the will of the decedent or the donee of the power has otherwise provided, the disclaimed interest devolves as if the disclaimant had predeceased the decedent or the donee of the power. In every case the disclaimer relates back to the date of the death of the decedent or of the donee. The provision that the disclaimer “relates back”, codifies the rule that a renunciation of a devise or legacy relates to the date of death of the decedent or donee and prevents the succession from becoming operative in favor of the disclaimant. See *In re Wilson's Estate*, 298 N.Y. 398, 83 N.E.2d 852 (1949). Also, *Bouse, for use of State v. Hull*, 168 Md. 1, 176 A. 645 (1935).

**Acceleration of Future Interests:** If a life estate or other future interest is disclaimed, the problem is raised of whether succeeding interests or estates accelerate in possession or enjoyment or whether the disclaimed interest must be marshalled to await the actual happening of the contingency. Subsection (c) provides that remainder interests are accelerated, the second sentence specifically stating that any future interest which is to take effect in possession or enjoyment after the termination of the estate or interest disclaimed, takes effect as if the disclaimant had predeceased the deceased owner or deceased donee of the power. Thus, if T leaves his estate in trust to pay the income to his son for life, remainder to

his son's children who survive him, and S disclaims with two children then living, the remainder in the children accelerates; the trust terminates and the children receive possession and enjoyment, even though the son may subsequently have other children or that one or more of the living children may die during their father's lifetime.

**Effect of Death or Disability of Person Entitled to Disclaim:** The effect of death of a person entitled to disclaim, including one under disability, is discussed under Subsection (a). A guardian or conservator of the estate on an incapacitated or protected person may disclaim for the ward. Subsection (b) makes no provision for an extension of time or for other relief in case of disability for the observance of the statutory requirements for effective disclaimer. The intent is that the period for disclaimer applies to a person under disability as well as to others, and includes a court which purports to act on behalf of one under disability in the absence of fraud, misconduct or other unusual circumstances. *Pratt v. Baker*, 48 Ill. App. 2d 442, 199 N.E.2d 307 (1964).

**Rights of Creditors and Others:** As regards creditors, taxing authorities and others, the provision for “relation back” has the legal effect of preventing a succession from becoming operative in favor of the disclaimant. The relation back is “for all purposes” which would include, among others for the purpose of rights of creditors, taxing authorities and assertion of dower. It is immaterial that the effect is to avoid the imposition of a higher death tax than would be the case if the interest had been accepted: *Estate of Aylsworth*, 74 Ill. App. 2d 375, 219 N.E.2d 779 (1966) [motive for the disclaimer is immaterial]; *People v. Flanagan*, 311 Ill. 203, 162 N.E. 848 (1928), 60 A.L.R. 305; *Cook v. Dove*, 32 Ill. 2d 109, 203 N.E.2d 892 (1965) [upholding for inheritance tax the right of appointees to take by default rather than under the power-holder's exercise of power]; *Matter of Wolfe's Estate*, 179 N.Y. 599, 72 N.E. 1152 (1904), aff'g, 89 App. Div. 349, 83 N.Y. Supp. 949 (1903); *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933); *In re Stone's Estate*, 132 Ia. 136, 109 N.W. 455 (1906); *Tax Commission v. Glass*, 199 Ohio St. 389, 164 N.E. 425 (1929); *U.S. v. McCrackin*, 189 F. Supp. 632 (S.D. Ohio 1960).

Similarly, numerous cases have held that a devisee or legatee can disclaim a devise or legacy despite the claims of creditors: *Hoecker v. United Bank of Boulder*, 476 F.2d 838 (CA 10 1973), aff'g, 334 F. Supp. 1080 (D. Colo. 1971) (bankruptcy); *U.S. v. McCrackin*, supra (Federal income tax liens); *Shoonover v. Osborne*, 193 Ia. 474, 187 N.W. 290 (1922); *Bradford v. Calhoun*, 120 Tenn. 53, 109 S.W. 502 (1908); *Carter v. Carter*, 63 N.J. Eq. 726,



53 A. 160 (1902); *Estate of Hansen*, 109 Ill. App. 2d 283, 248 N.E.2d 709 (1969) (judgment creditor); 37 Mich. L. Rev. 1168; 43 Yale L.J. 1030; 27 A.L.R. 477; 133 A.L.R. 1428. A creditor is not entitled to notice of the disclaimer (*In re Estate of Hansen*, 109 Ill. App. 2d 283, 248 N.E.2d 709 (1969)).

**[Comment to Subsection (d).]**

*Bars to Disclaimer — Waiver — Estoppel:* It may be necessary or advisable to sell real estate in a decedent's estate before the expiration of the period permitted for disclaimer. In such case, the possibility of a disclaimer being filed within the period, could be a deterrent to sale and delivery of good title. Subsection (d) expressly authorizes an heir, devisee, legatee or other person entitled to disclaim, to indicate in writing his intention to "waive" his right to disclaimer, and thus avoid any delay in the completion of a sale or other disposition of estate assets. the written waiver bars the right of the person subsequently to disclaim the property or interest therein and is binding on persons claiming through or under him.

Similarly, Subsection (d) provides that various acts of a person entitled to disclaim in regard to property or an interest therein, such as making an assignment, conveyance, encumbrance, pledge or transfer of the property or interest, or a contract therefor, bars the right of the person to disclaim and is binding on all persons claiming through or under him.

*Spendthrift Provisions:* The existence of a limitation on the interest of an heir, legatee, devisee or other disclaimant in the nature of a spendthrift provision or similar restriction is expressly declared not to affect the right to disclaim. Without this provision, there might be a question as to whether the beneficiary of a spendthrift trust can disclaim under the statute (Griswold, Spendthrift Trust [2d Ed] Section 524, p. 603). If a person who is under no legal disability wishes to refuse a beneficial interest under a trust, he should not be powerless to make an effective disclaimer even though the intended interest once accepted by him would be inalienable. (Scott on Trust, Section 337.7, p. 2683, 3d Ed.)

When a beneficial interest is accepted by a beneficiary, he cannot thereafter disclaim or release it (Griswold, supra, Section 534, p. 603 note 48). As to what conduct amounts to an acceptance, see *In re Wilson's Estate*, 298 N.Y. 398, 83, N.E.2d 852 (1949).

*Judicial Sale:* The section provides that the right to disclaim is barred by a sale of the property or interest under a judicial sale. Judicial sales are ordered in many different types of proceeding such as foreclosure of mortgage or trust deed, enforcement of lien, partition proceedings and proceedings for the sale of real property of a decedent or ward for

certain purposes. Probate laws frequently permit a representative to mortgage or pledge property of the decedent or ward in certain circumstances. Execution sales are made pursuant to a writ to satisfy a money judgment. Subsection (d) has the effect of providing that the making of a judicial sale for the account of the heir, devisee, or beneficiary, bars him from renouncing the property or interest. To be distinguished from a judicial sale, is a taking pursuant to eminent domain, which is considered to be a taking of property without the owner's comment and unrelated to his obligations or commitments. The right to disclaim the proceeds of a condemnation action if otherwise timely and in accordance with this Section, should not, therefore, be barred under Subsection (d).

**[Comment to Subsection (e).]**

Subsection (e) provides that the right to disclaim under the law does not abridge the right of any person to waive, release, disclaim or renounce any property or interest therein under any other statute. The principal statutes to which this provision is pointed are those dealing with spousal renunciations and release of powers.

Being a codification of the common law in regard to the renunciation of the property, this Section is intended to constitute an *exclusive remedy* for the disclaimer of testamentary successions apart from those provided by other statutes, and supplants the common law right to disclaim.

**[Comment to Subsection (f).]**

Subsection (f) deals with the application of this Section to property interests under instruments or in estates in existence on the effective date. If the interest is a present one and the filing time had not expired, the holder is given a full period after enactment within which to disclaim the interest. If the interest is a future one, the holder is given a full period after the interest becomes indefeasibly vested or the takers finally ascertained, after enactment in which to disclaim it. If T dies in 1960 trusteeing his estate to W for life, remainder to such of T's sons as are living at W's death and W dies in 1975, this Section permits a son to disclaim his remainder interest after it ripens even though it arises under an instrument predating the effective date of this Section. The application of statute to pre-existing instruments in like situations finds support in cases such as *Wills of Allis*, 6 Wis. 2d 1, 94 N.W.2d 226 (1959), 69 A.L.R.2d 1128.

**[Comment to § 15-2-801.]**

The above text, consists of Sections 1 through 6 of Uniform Disclaimer of Transfers By Will, Intestacy or Appointment Act of

1973, redesignated as subsections (a) through (f).

The Comments following each subsection are the Official Comments to the 1973 statute. The word “renunciation” has been substituted for “disclaimer” because the original Section 2-801 used the term “renunciation” and several cross-references to this term appear in other sections of this Code. It is the view of the Joint Editorial Board that the terms “renunciation” and “disclaimer” have the same meaning.

The principal substantive difference between original Section 2-801 and the 1973 replacement therefor is that the former permitted renunciation by the personal representative of a person who might have renounced during his lifetime. Under the new uniform act, which is now the official text of Section 2-801, the right to renounce terminates upon the death of the person who might have renounced during his lifetime. Also, the original version was less precise than the present version in the important provisions of subsection (b) which govern the time for renunciation.

This section is designed to facilitate renunciation in order to aid postmortem planning. Although present law in all states permits renunciation of a devise under a will, the common law did not permit renunciation of an intestate share. There is no reason for such a

distinction, and some states have already adopted legislation permitting renunciation of an intestate share. Renunciation may be made for a variety of reasons, including carrying out the decedent’s wishes not expressed in a properly executed will.

Under the rule of this section, renounced property passes as if the renouncing person had failed to survive the decedent. In the case of intestate property, the heir who would be next in line in succession would take; often this will be the issue of the renouncing person, taking by representation. For consistency the same rule is adopted for renunciation by a devisee; if the devisee is a relative who leaves issue surviving the testator, the issue will take under Section 2-605; otherwise disposition will be governed by Section 2-606 and general rules of law.

The section limits renunciation to nine months after the death of the decedent or if the taker of the property is not ascertained at that time, then nine months after he is ascertained. If the personal representative is concerned about closing the estate within that nine months period in order to make distribution, he can obtain a waiver of the right to renounce. Normally this should be no problem, since the heir or devisee cannot renounce once he has taken possession of the property.

The presence of a spendthrift clause does not prevent renunciation under this section.

### **15-2-802. Effect of divorce, annulment, and decree of separation.**

— (a) A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

(b) For purposes of parts 1, 2, 3 and 4 of this chapter and of section 15-3-203 of this code, a surviving spouse does not include:

- (1) a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife;
- (2) a person who, following a decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person; or
- (3) a person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights. [I.C., § 15-2-802, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 7, p. 319.]

### **STATUTORY NOTES**

**Cross References.** — Revocation by divorce, § 15-2-508.

Waiver of rights by surviving spouse, § 15-2-208.



## RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 125 et seq.

31 Am. Jur. 2d, Executors and Administrators, § 696.

80 Am. Jur. 2d, Wills, § 1073.

**C.J.S.** — 26A C.J.S., Descent and Distribution, §§ 66, 67.

34 C.J.S., Executors and Administrators, § 489.

**A.L.R.** — Abandonment, desertion, or refusal to support on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 A.L.R.3d 446.

Adultery on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 A.L.R.3d 486.

## COMMENT TO OFFICIAL TEXT

See Section 2-508 for similar provisions relating to the effect of divorce to revoke devises to a spouse.

Although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse. Normally, this is divorce. Subsection (a) states an obvious proposition, but subsection (b) deals with the difficult problem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees but may arise as to a local decree where there is some defect in jurisdiction; the basic principle underlying

these provisions is estoppel against the surviving spouse. Where there is only a legal separation, rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under Section 2-204 as a renunciation of benefits under a prior will and by intestate succession.

In 1975, the Joint Editorial Board recommended the addition, in the preliminary statement of subsection (b), of explicit reference to Section 3-203 which controls priorities for appointment as personal representative.

**15-2-803. Effect of homicide on distribution at death. —**

(a)(1) "Slayer" shall mean any person who participates, either as principal or as an accessory before the fact, in the wilful and unlawful killing of any other person.

(2) "Decedent" shall mean any person whose life is so taken.

(3) "Property" shall include any real and personal property and any right or interest therein.

(b) No slayer shall in any way acquire any property or receive any benefit as a result of the death of the decedent, but such property shall pass as provided in the sections [subsections] following.

(c) The slayer shall be deemed to have predeceased the decedent as to property which would have passed from the decedent or his estate to the slayer under the statutes of descent and distribution or have been acquired by statutory right as surviving spouse or under any agreement made with the decedent.

(d) Property which would have passed to or for the benefit of the slayer by devise or legacy from the decedent shall be distributed as if he had predeceased the decedent.

(e) Any community property which would have passed to or for the benefit of the slayer by devise, legacy or intestate succession from the decedent shall be distributed as if he had predeceased the decedent.

(f) Property in which the slayer holds a reversion of vested remainder and would have obtained the right of present possession upon the death of the decedent shall pass to the estate of the decedent during the period of the life expectancy of decedent; if he held the particular estate or if the particular estate is held by a third person it shall remain in his hands for such period.



(g) Any interest in property whether vested or not, held by the slayer, subject to be divested, diminished in any way or extinguished, if the decedent survives him or lives to a certain age, shall be held by the slayer during his lifetime or until the decedent would have reached such age, but shall then pass as if the decedent had died immediately thereafter.

(h) As to any contingent remainder or executory or other future interest held by the slayer, subject to become vested in him or increased in any way for him upon the condition of the death of the decedent:

(1) If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent.

(2) In any case the interest shall not be vested or increased during period of the life expectancy of the decedent.

(i)(1) Property appointed by the will of the decedent to or for the benefit of the slayer shall be distributed as if the slayer had predeceased the decedent.

(2) Property held either presently or in remainder by the slayer, subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment shall pass to the estate of the decedent, and property so held by the slayer, subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons or to a class of persons, shall pass to such person or persons, or in equal shares to the members of such class of persons, exclusive of the slayer.

(j)(1) Insurance proceeds payable to the slayer as the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or as the survivor of a joint life policy, shall be paid instead to the estate of the decedent, unless the policy or certificate designate [designates] some person other than the slayer or his estate as secondary beneficiary to him and in which case such proceeds shall be paid to such secondary beneficiary in accordance with the applicable terms of the policy.

(2) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, unless the policy names some person other than the slayer or his estate as secondary beneficiary, or unless the slayer by naming a new beneficiary or assigning the policy performs an act which would have deprived the decedent of his interest in the policy if he had been living.

(k) Any insurance company making payment according to the terms of its policy or any bank or other person performing an obligation for the slayer as one of several joint obligees shall not be subjected to additional liability by the terms of this Part if such payment or performance is made without written notice, at its home office or at an individual's home or business address, of the killing by a slayer.

The provisions of this Part shall not affect the rights of any person who, before the interests of the slayer have been adjudicated, purchases or has agreed to purchase, from the slayer for value and without notice, property which the slayer would have acquired except for the terms of this Part, but

all proceeds received by the slayer from such sale shall be held by him in trust for the persons entitled to the property under the provisions of this Part, and the slayer shall also be liable both for any portion of such proceeds which he may have dissipated and for any difference between the actual value of the property and the amount of such proceeds.

(m) The record of his conviction of having participated in the wilful and unlawful killing of the decedent shall be admissible in evidence against a claimant of property in any civil action arising under this Part.

(n) This section shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this state that no person shall be allowed to profit by his own wrong, wherever committed. [I.C., § 15-2-803, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487.]

### STATUTORY NOTES

**Compiler's Notes.** — The bracketed insertions in subsections (b) and (j)(1) were added by the compiler to make the sentences more clear.

### JUDICIAL DECISIONS

#### ANALYSIS

Application.  
Cause of death.  
Criminal conviction.  
Insurance policy.

#### **Application.**

This section applies only when there is no provision whatever in the insurance policy as to the disposition of proceeds when the beneficiary kills the insured. *Wilkins v. Fireman's Fund Am. Life Ins. Co.*, 107 Idaho 1006, 695 P.2d 391 (1985).

#### **Cause of Death.**

Magistrate's conclusion that the wound inflicted by wife must necessarily have been the "direct cause" of death for this section to apply was erroneous, and the fact that the gunshot wound was not the immediate cause of death was not controlling; a nonfatal wound is the legal cause of death if it started a chain of causation which led to death, and the one who inflicted such a wound has committed homicide. *Eliassen v. Fitzgerald*, 105 Idaho 234, 668 P.2d 110 (1983).

Where the gunshot wound inflicted by decedent's wife hastened the decedent's death by weakening his physical condition and by interrupting his chemotherapy treatments, thus allowing preexisting cancer, which had been controlled, to rebound and rapidly grow, the gunshot wound was a substantial factor

and a proximate cause of the death of decedent, and therefore this section applied to prevent wife from inheriting from decedent husband's estate. *Eliassen v. Fitzgerald*, 105 Idaho 234, 668 P.2d 110 (1983).

#### **Criminal Conviction.**

A person may be acquitted of criminal charges because guilt is not proven beyond a reasonable doubt, or a person may not even be tried but nevertheless may still be shown in a civil action to have been a willful slayer; a criminal conviction is not a mandatory prerequisite to application of this section. *Eliassen v. Fitzgerald*, 105 Idaho 234, 668 P.2d 110 (1983).

#### **Insurance Policy.**

Husband convicted of the murder of his wife was not entitled to any part of the proceeds of her term insurance policy for which he had been listed as the contingent beneficiary. Additionally, husband's argument that this amounted to an unconstitutional taking was without merit. *United Investors Life Ins. Co. v. Severson*, 143 Idaho 628, 151 P.3d 824 (2007).

## RESEARCH REFERENCES

**Am. Jur.** — 20 Am. Jur. 2d, Cotenancy and Joint Ownership, § 10.

23 Am. Jur. 2d, Descent and Distribution, § 44 et seq.

44A Am. Jur. 2d, Insurance, § 1689 et seq.

79 Am. Jur. 2d, Wills, §§ 154, 155.

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 56 et seq.

46 C.J.S., Insurance, § 1961.

94 C.J.S., Wills, § 100.

**A.L.R.** — Homicide precluding taking under will or by intestacy. 25 A.L.R.4th 787.

## COMMENT TO OFFICIAL TEXT

A growing group of states have enacted statutes dealing with the problems covered by this section, and uniformity appears desirable. The section is confined to intentional and felonious homicide and excludes the accidental manslaughter killing.

At first it may appear that the matter dealt with is criminal in nature and not a proper matter for probate courts. However, the concept that a wrongdoer may not profit by his own wrong is a civil concept, and the probate court is the proper forum to determine the effect of killing on succession to property of the decedent. There are numerous situations where the same conduct gives rise to both criminal and civil consequences. A killing may result in criminal prosecution for murder and civil litigation by the murdered person's family under wrongful death statutes. While conviction in the criminal prosecution under this section is treated as conclusive on the matter

of succession to the murdered person's property, acquittal does not have the same consequences. This is because different considerations as well as a different burden of proof enter into the finding of guilty in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed the decedent and thus be barred under this section from sharing in the estate. An analogy exists in the tax field, where a taxpayer may be acquitted of tax fraud in a criminal prosecution but found to have committed the fraud in a civil proceeding. In many of the cases arising under this section there may be no criminal prosecution because the murderer has committed suicide.

## PART 9. CUSTODY AND DEPOSIT OF WILLS

## 15-2-901. [Reserved.]

**15-2-902. Duty of custodian of will — Liability.** — After the death of the testator, any person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate [or,] and if none is known, to an appropriate court. Any person who willfully fails to deliver a will is liable to any person aggrieved for the damages which may be sustained by the failure. Any person who willfully refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court. [I.C., § 15-2-902, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The bracketed insertion in the first sentence was added by the compiler to make the sentence more clear.



RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 730. failure to submit will for probate within time  
**C.J.S.** — 95 C.J.S., Wills, § 441 et seq. limit set by statute. 17 A.L.R.3d 1361.  
**A.L.R.** — What circumstances excuse the

COMMENT TO OFFICIAL TEXT

Model Probate Code Section 63, slightly changed. A person authorized by a Court to accept delivery of a will from a custodian may, in addition to a registrar or clerk, be a uni-  
 versal successor or other person authorized under the law of another nation to carry out the terms of a will.

PART 10. WILL REGISTRY

**15-2-1001. Will registry.** — The secretary of state shall create and maintain a will registry. The information contained in such registry shall include: the full name of the person making the will; the date the will was made; and sufficient identification of the location of the will at the time of registration. The method of registration shall be on a form required by the secretary of state. The fee for registration shall be ten dollars (\$10.00) which shall be deposited by the secretary of state in the general fund. The secretary of state shall not be liable in any way for the accuracy of the information contained in the registry. The existence, or nonexistence, of a registration for a particular will shall not be considered as an evidentiary fact in any proceeding relating to such will. The failure to file information about a will in the registry shall not be a factor in the validity of the will, nor shall the failure to file be considered as malpractice on the part of any attorney as to the will. Only interested persons as defined in section 15-1-201, Idaho Code, or their attorneys may search the records contained herein. The secretary of state shall not be liable for the accuracy of the representation of the interested person or the interested person's attorney. [I.C., § 15-2-1001, as added by 2000, ch. 181, § 1, p. 450.]

CHAPTER 3

PROBATE OF WILLS AND ADMINISTRATION

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15-3-916. [Repealed.]

#### PART 10. CLOSING ESTATES

15-3-1001. Formal proceedings terminating administration — Testate or intestate — Order of general protection.

15-3-1002. Formal proceedings terminating testate administration — Order construing will without adjudicating testacy.

15-3-1003. Closing estates — By sworn state-



## SECTION.

- ment of personal representative.
- 15-3-1004. Liability of distributees to claimants.
- 15-3-1005. Limitations on proceedings against personal representative.
- 15-3-1006. Limitations on actions and proceedings against distributees.
- 15-3-1007. Certificate discharging liens securing fiduciary performance.
- 15-3-1008. Subsequent administration.
- 15-3-1009. Decree of distribution to attorney general.

## PART 11. COMPROMISE OF CONTROVERSIES

- 15-3-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.
- 15-3-1102. Procedure for securing court approval of compromise.

## PART 12. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES

- 15-3-1201. Collection of personal property by affidavit.
- 15-3-1202. Effect of affidavit.
- 15-3-1203. Small estates — Summary administrative procedure.

## SECTION.

- 15-3-1204. Small estates — Closing by sworn statement of personal representative.
- 15-3-1205. Summary administration of estates in which a surviving spouse is the sole beneficiary.

## PART 13. UNIFORM ESTATE TAX APPORTIONMENT

- 15-3-1301. Short title.
- 15-3-1302. Definitions.
- 15-3-1303. Apportionment by will or other dispositive instrument.
- 15-3-1304. Statutory apportionment of estate taxes.
- 15-3-1305. Credits and deferrals.
- 15-3-1306. Insulated property, advancement of tax.
- 15-3-1307. Apportionment and recapture of special elective benefits.
- 15-3-1308. Securing payment of estate tax from property in possession of fiduciary.
- 15-3-1309. Collection of estate tax by fiduciary.
- 15-3-1310. Right of reimbursement.
- 15-3-1311. Action to determine or enforce part.
- 15-3-1312. Uniformity of application and construction.
- 15-3-1313. Severability.
- 15-3-1314. Delayed application.

## PART 1. GENERAL PROVISIONS

**15-3-101. Devolution of estate at death — Restrictions.** — The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. Upon the death of a person, his separate property devolves to the persons to whom it is devised by his last will, or to those indicated as substitutes for them in cases involving lapse, renunciation or other circumstances affecting the devolution of testate estates, or in the absence of testamentary disposition to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting the devolution of intestate estates, and upon the death of a husband or wife, the decedent's share of their community property devolves to the persons to whom it is devised by his last will, or in the absence of testamentary disposition, to the surviving spouse, but all of their community property which is under the management and control of the decedent is subject to his debts and administration, and that portion of their community property which is not under the management and control of the decedent but which is necessary to carry out the provisions of his will is subject to administration; but the devolution of all the above described property is subject to rights to homestead allowance, exempt property and family allowances, to renunciation to rights of creditors, elective share of the surviving spouse and

to administration. [I.C., § 15-3-101, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Successors' rights if no administration, § 15-3-901.

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as

adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### JUDICIAL DECISIONS

#### ANALYSIS

Community property.  
Devolution to heirs.

#### Community Property.

The community property of a deceased spouse may be disposed of to persons other than the surviving spouse. *Travelers Ins. Co. v. Johnson*, 97 Idaho 336, 544 P.2d 294 (1975).

surviving grandchildren of those children who had predeceased her, all such heirs became cotenants in the property. *Fairchild v. Fairchild*, 106 Idaho 147, 676 P.2d 722 (Ct. App. 1984).

#### Devolution to Heirs.

Where owner of property died intestate leaving as her heirs her children and the

#### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Federal homestead.  
Jurisdiction of court.

#### Federal Homestead.

The court had no jurisdiction over federal homestead property and no power or authority to order sale of such real estate, and administrator of the estate of deceased entryman had no power or authority to convey any title to such property. *Council Imp. Co. v. Draper*, 16 Idaho 541, 102 P. 7 (1909).

Entryman, prior to his final proof, had no devisable interest in land, but the land must go according to the acts of congress, and person taking the same upon the death of entryman took as a donee of the government,

and not by descent or by devise. State laws in regard to descent of property have no application to a public land entry. *Hays v. Wyatt*, 19 Idaho 544, 115 P. 13, 34 L.R.A. (n.s.) 397 (1911).

#### Jurisdiction of Court.

The court has jurisdiction over and administers the entire community estate upon the death of either spouse, and the settlement of the entire community estate for the purpose of satisfying community debts. *Davenport v. Simons*, 68 Idaho 21, 189 P.2d 90 (1947).

### RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1287 et seq.

**C.J.S.** — 96 C.J.S., Wills, § 1192 et seq.

### COMMENT TO OFFICIAL TEXT

[General comment to §§ 15-3-101 — 15-3-1204.]

The provisions of this Article [Chapter] describe the Flexible System of Administration to Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' es-

tates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the Uniform Probate Code.

The organization and detail of the system here described may be expressed in varying

ways and some states may see fit to reframe parts of this Article [Chapter] to better accommodate local institutions. Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibility, if the following essential characteristics are carefully protected in the redrafting process:

(1) Post-mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending the office of personal representative. Neither are compelled, however, but are left to be obtained by persons having an interest in the consequence of probate or appointment. Estates descend at death to successors identified by any probated will, or to heirs if no will is probated, subject to rights which may be implemented through administration.

(2) Two methods of securing probate of wills which include a non-adjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal or formal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a personal representative.

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the Court (supervised administration) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in estates (including personal representatives, whether appointed informally or after notice) may use an "in and out" relationship to the

Court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of personal representatives, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined, by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration without further order of the Court, except that supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

(10) Purchasers from personal representatives and from distributees of personal representatives are protected so that adjudications regarding the testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a personal representative who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of the administration and unsecured claims not previously barred by non-claim statutes are barred after three years from the decedent's death.

Overall, the system accepts the premise that the Court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the Court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

**15-3-102. Necessity of order of probate for will.** — Except as provided in section 15-3-1201 of this code, to be effective to prove the



transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if (1) no court proceeding concerning the succession or administration of the estate has occurred, and (2) either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings. [I.C., § 15-3-102, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 728.

**C.J.S.** — 95 C.J.S., Wills, § 451 et seq.

**A.L.R.** — Probate, in state where assets are

found, of will of nonresident which has not been admitted to probate in state of domicile. 20 A.L.R.3d 1033.

### COMMENT TO OFFICIAL TEXT

The basic idea of this section follows Section 85 of the Model Probate Code. The exception referring to Section 3-1201 relates to affidavit procedures which are authorized for collection of estates worth less than \$5,000 [\$100,000 in Idaho].

Section 3-107 and various sections in Parts 3 and 4 of this Article [Chapter] make it clear that a will may be probated without appointment of a personal representative, including any nominated by the will.

The requirement of probate stated here and the limitations on probate provided in 3-108 mean that questions as to testacy may be eliminated simply by the running of time. Under these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the decedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive.

The exceptions to the section (other than the exception relevant to small estates) are not intended to accommodate cases of late-discovered wills. Rather, they are designed to make the probate requirement inapplicable where circumstances led survivors of a decedent to believe that there was no point to probating a will of which they may have had

knowledge. If any will was probated within three years of death, or if letters of administration were issued in this period, the exceptions to the section are inapplicable. If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, with reference to the estate they claim, either that it has been possessed by those to whom it was devised or that it has been unknown to the decedent's heirs or devisees and not possessed by any.

It is to be noted, also, that devisees who are able to claim under one of the exceptions to this section may not obtain probate of the will or administration of the estate to assist them in their efforts to obtain the estate in question. The exceptions are to a rule which bars admission of a will into evidence, rather than to the section barring late probate and late appointment of personal representatives. Still, the exceptions should serve to prevent two "hard" cases which can be imagined readily. In one, a surviving spouse fails to seek probate of a will, giving her the entire estate of the decedent because she is informed or believes that all of her husband's property was held by them jointly, with right of survivorship. Later, it is discovered that she was mistaken as to the nature of her husband's title. The other case involves a devisee who sees no point to securing probate of a will in his favor because he is unaware of any estate. Subsequently, valuable rights of the decedent are discovered.

**15-3-103. Necessity of appointment for administration.** — Except as otherwise provided in chapter 4 of this code, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters. [I.C., § 15-3-103, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### Power to Appoint Administrator.

Power to appoint an administrator is wholly statutory. *Russell v. Bow*, 50 Idaho 264, 295 P. 437 (1931).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 11 et seq., 21, 157.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 63.

**A.L.R.** — Capacity of infant to act as executor or administrator, and effect of improper appointment. 8 A.L.R.3d 590.

Eligibility of foreign corporation to appointment as executor, administrator, or testamentary trustee. 26 A.L.R.3d 1019.

Physical condition as affecting competency

to act as executor or administrator. 71 A.L.R.3d 675.

Propriety of court's appointment, as administrator of decedent's estate, of stranger rather than person having statutory preference. 84 A.L.R.3d 707.

Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative. 11 A.L.R.4th 638.

### COMMENT TO OFFICIAL TEXT

This section makes it clear that appointment by a public official is required before one can acquire the status of personal representative. "Qualification" is dealt with in Section 3-601. "Letters" are the subject of Section 1-305. Section 3-701 is also related, since it deals with the time of accrual of duties and powers of personal representatives.

See § 3-108 for the time limit on requests for appointment of personal representatives.

In Article IV [Chapter 4], Sections 4-204 and 4-205 permit a personal representative from another state to obtain the powers of one appointed locally by filing evidence of his authority with a local Court.

**15-3-104. Claims against decedent — Necessity of administration.** — No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this chapter. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in section 15-3-1004 of this code or from a former personal

representative individually liable as provided in section 15-3-1005 of this code. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein. [I.C., § 15-3-104, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Notice to creditors, § 15-3-801.

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as

adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### JUDICIAL DECISIONS

#### Procedural Rules.

When the Idaho department of health and welfare attempted to proceed against decedent's estate to recover Medicaid benefits, the department argued that the estate's motion for judgment on the pleadings was not a proper procedural vehicle under the probate code; nonetheless, the estate was entitled to challenge the department's claim, and the

Idaho Rules of Civil Procedure did apply to the probate code. *State, Dept. of Health & Welfare v. Estate of Elliott (In re Estate of Elliott)*, 141 Idaho 177, 108 P.3d 324 (2005).

**Cited in:** *Keeven v. Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994); *Miller v. Estate of Prater*, 141 Idaho 208, 108 P.3d 355 (2005).

### DECISIONS UNDER PRIOR LAW

#### Settlement Without Administration.

It is not absolutely necessary that administration be had of an estate of an intestate when there are no debts against the estate

and the heirs have made a satisfactory distribution of the estate among themselves. *Gwinn v. Melvin*, 9 Idaho 202, 72 P. 961 (1903).

### RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 134 et seq.

31 Am. Jur. 2d, Executors and Administrators, §§ 564 et seq., 640 et seq., 1236.

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 112 et seq.

34 C.J.S., Executors and Administrators, § 540 et seq.

**A.L.R.** — Amount of claim filed against

decedent's estate as limiting amount recoverable in action against estate. 25 A.L.R.3d 1356.

Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff. 36 A.L.R.3d 693.

Garnishment against executor or administrator by creditor of estate. 60 A.L.R.3d 1301.

### COMMENT TO OFFICIAL TEXT

This and sections of Part 8, Article III [Chapter 3], are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative (Section 3-301). If no appointment is granted to another within 45 days after the decedent's death, a creditor may be eligible to be appointed if other persons with priority decline to serve or are ineligible (Section

3-203). But, if a personal representative has been appointed and has closed the estate under circumstances which leave a creditor's claim unbarred, the creditor is permitted to enforce his claims against distributees, as well as against the personal representative if any duty owed to creditors under 3-807 or 3-1003 has been breached. The methods for closing estates are outlined in Sections 3-1001 through 3-1003. Termination of appointment under Section 3-608 et seq. may occur though



the estate is not closed and so may be irrelevant to the question of whether creditors may pursue distributees.

**15-3-105. Proceedings affecting devolution and administration — Jurisdiction of subject matter.** — Persons interested in decedents’ estates may apply to the registrar for determination in the informal proceedings provided in this chapter, and may petition the court for orders in formal proceedings within the court’s jurisdiction including but not limited to those described in this chapter. The court has exclusive jurisdiction of formal proceedings to determine how decedents’ estates subject to the laws of this state are to be administered, expended and distributed. [I.C., § 15-3-105, as added by 1971, ch. 111, § 1, p. 233.]

JUDICIAL DECISIONS

Allocation of Shares or Expenses.

Jury’s determination of damages in favor of a beneficiary, in his action for breach of a contract made by a husband and wife for disposition of a survivor’s estate, was reversed; trial court and the parties mistakenly believed that the contract establishing the survivor’s estate contained provisions relating to the determination of the beneficiary’s entitlement, and because there was confusion

regarding what expenses, particularly attorney fees, could be deducted from his share, the judge handling the probate was best positioned to determine the net share of any estate beneficiary. *Miller v. Estate of Prater*, 141 Idaho 208, 108 P.3d 355 (2005).

**Cited in:** *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

DECISIONS UNDER PRIOR LAW  
ANALYSIS

Jurisdiction.  
Nonresident guardian ad litem.

Jurisdiction.

Proceedings in probate are statutory and it is necessary to their validity that the court have jurisdiction of the subject-matter; that is, of the estate of the deceased and of the question which its judgment assumes to decide. *Swinehart v. Turner*, 38 Idaho 602, 224 P. 74 (1924).

When jurisdiction of court attaches to an estate it continues until the assets are distrib-

uted and the estate is closed. *Walker Bank & Trust Co. v. Steely*, 54 Idaho 591, 34 P.2d 56 (1934).

Nonresident Guardian Ad Litem.

In an application for the admission of a will to probate, a nonresident may be appointed guardian ad litem for minor heirs. *Pine v. Callahan*, 8 Idaho 684, 71 P. 473 (1902).

RESEARCH REFERENCES

**Am. Jur.** — 23 Am. Jur. 2d, Descent and Distribution, § 59 et seq.  
80 Am. Jur. 2d, Wills, § 1287 et seq.  
31 Am. Jur. 2d, Executors and Administra-

tors, §§ 92, 368 et seq., 924.  
**C.J.S.** — 26A C.J.S., Descent and Distribution, § 82 et seq.  
95 C.J.S., Wills, § 819 et seq.

COMMENT TO OFFICIAL TEXT

This and other sections of Article III [Chapter 3] contemplate a non-judicial officer who will act on informal application and a judge who will hear and decide formal petitions. See Section 1-307 which permits the judge to

perform or delegate the functions of the Registrar. *However, the primary purpose of Article III [Chapter 3] is to describe functions to be performed by various public officials, rather than to prescribe how these responsibilities*

*should be assigned within a given state or county.* Hence, any of several alternatives to the organizational scheme assumed for purposes of this draft would be acceptable.

For example, a state might assign responsibility for maintenance of probate files and records, and for receiving and acting upon informal applications, to existing, limited power probate offices. Responsibility for hearing and deciding formal petitions would then be assigned to the court of general jurisdiction of each county or district.

If separate courts or offices are not feasible, it may be preferable to concentrate authority for allocating responsibility respecting formal and informal proceedings in the judge. To do so helps fix responsibility for the total operation of the office. This is the assumption of this draft.

It will be up to each adopting state to select the organizational arrangement which best meets its needs.

If the office with jurisdiction to hear and decide formal petitions is the county or district court of general jurisdiction, there will be little basis for objection to the broad state-

ment of concurrent jurisdiction of this section. However, if a more specialized "states" court is used, there may be pressure to prevent it from hearing negligence and other actions involving jury trials, even though it may be given unlimited power to decide other cases to which a personal representative is a party. A system for certifying matters involving jury trials to the general trial court could be provided, although the alternative of permitting the estates court to empanel juries where necessary might not be unworkable. In any event, the jurisdiction of the "estates" or "probate" Court in regard to negligence litigation would only be concurrent with that of the general trial court. The important point is that the estates court, whatever it is called, should have unlimited power to hear and finally dispose of all matters relevant to determination of the extent of the decedent's estate and of the claims against it. The jury trial question is peripheral.

See the comment to the next section regarding adjustments which might be made in the Code by a state with a single court of general jurisdiction for each county or district.

**15-3-106. Civil litigation — Notice.** — Subject to general rules concerning the proper location of civil litigation and jurisdiction of persons, the court may herein determine any other controversy concerning a succession or to which an estate, through a personal representative, may be a party. Persons notified are bound though less than all interested persons may have been given notice. [I.C., § 15-3-106, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The Uniform Probate Code as proposed in § 15-3-105 contained an additional sentence which read: "The court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property, alleged to belong to the estate, and if any action or proceeding in which property dis-

tributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent." This provision was stated in the Official Comments to be inappropriate where probate matters are assigned to a branch of a single court of general jurisdiction. The above section is a version suggested in the Comments to § 3-106 to cover this matter in such cases.

## JUDICIAL DECISIONS

### Determination of Multiple Issues.

Trial court and the parties mistakenly believed that the contract establishing the survivor's estate contained provisions relating to the determination of the beneficiary's entitlement, and because there was confusion regarding what expenses, particularly attorney fees, could be deducted from his share, the judge handling the probate was best positioned to determine the net share of any

estate beneficiary, considering all expenses, the overall scheme of distribution, and the effect of one beneficiary's entitlement upon that of the others; by following the intent of the applicable statutes and rules pertaining to assignment of probate proceedings to the magistrate division, confusion could be averted or alleviated. *Miller v. Estate of Prater*, 141 Idaho 208, 108 P.3d 355 (2005).

**15-3-107. Scope of proceedings — Proceedings independent — Exception.** — Unless supervised administration as described in Part 5, chapter 3, of this code is involved, (1) each proceeding before the court or registrar is independent of any other proceeding involving the same estate; (2) petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this chapter, no petition is defective because it fails to embrace all matters which might then be the subject of a final order; (3) proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and (4) a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment. [I.C., § 15-3-107, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### JUDICIAL DECISIONS

#### **Discretion.**

In a dispute involving the distribution and management of deceased's estate which had been at various levels of the court system for nearly four years, where the involved parties had repeatedly appealed multiple issues, including an order to remove the personal representative and an order to pay attorney fees,

the magistrate did not err in conducting one continuous proceeding to decide the multiple issues, thus avoiding the even more unnecessary delay and expense of requiring decisions to be made without reference to, and in, entirely separate, proceedings. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 144, 145 et seq.

### COMMENT TO OFFICIAL TEXT

This section and others in Article III [Chapter 3] describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections 3-501 through 3-505 describe supervised administration, a judicial proceeding which is continuous throughout administration. It corresponds with the theory of administration of decedents' estates which prevails in many states. See, section 62, Model Probate Code. If supervised administration is not requested, persons interested in an estate may use combinations of the formal proceedings (order by judge after notice to persons concerned with the relief sought), informal proceedings (request for the limited

response that non-judicial personnel of the probate court are authorized to make in response to verified application) and filings provided in the remaining Parts of Article III [Chapter 3] to secure authority and protection needed to administer the estate. Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain proceeding if not otherwise prescribed by the Code is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by Sections 3-106 and 3-602. 3-201 locates venue for all proceedings at the place where the first proceeding occurred.



**15-3-108. Probate — Testacy and appointment proceedings — Ultimate time limit.** — No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three (3) years after the decedent's death, except (1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding; (2) appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within three (3) years after the conservator becomes able to establish the death of the protected person; and (3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve (12) months from the informal probate or three (3) years from the decedent's death. These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases under (1) or (2) of this section, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this code which relate to the date of death. [I.C., § 15-3-108, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### **Laches.**

A wife who does not assert her rights to, or interest in, the property of her husband until after his death, even though living separate and apart from such husband, but does assert

such right immediately after the death of such husband, and prosecutes her action with diligence, is not guilty of laches, or estopped from asserting such right. *Hilton v. Stewart*, 15 Idaho 150, 96 P. 579 (1908).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 246 et seq., 601, 971 et seq.

79 Am. Jur. 2d, Wills, § 762 et seq.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 66.

95 C.J.S., Wills, § 530 et seq.

**A.L.R.** — What circumstances excuse failure to submit will for probate within time limit set by statute. 17 A.L.R.3d 1361.

## COMMENT TO OFFICIAL TEXT

This section establishes a basic limitation period of three years within which it may be determined whether a decedent left a will and to commence administration of his estate. But, an exception assures that heirs will have at least one year after an informal probate to initiate a contest and to secure administration of the estate as intestate.

If no will is probated within three years from death, the section has the effect of making the assumption of intestacy final. If a will has been informally probated within the period, the section has the effect of making the informal probate conclusive after three years or within twelve months from informal probate, if later. Heirs or devisees can protect themselves against change within the three years of assumption concerning whether the decedent left a will or died intestate by bringing a formal proceeding shortening the period to that described in Sections 3-412 and 3-413.

A personal representative who has been appointed under an assumption concerning testacy which may be reversed in the three-year period if there has been no formal proceeding, is protected by Section 3-703. It relieves a personal representative of liability for surcharge for certain distributions made pursuant to an informally probated will, or under authority of informally issued letters of administration. Distributees who receive an estate distributed before the three-year period expires where there has been no formal determination accelerating the time for certainty, remain potentially liable to persons determined to be entitled by formal proceedings instituted within the basic period under Sections 3-909 and 3-1006.

Purchasers from personal representatives and distributees may be protected without

regard to whether the three-year period has run. See Sections 3-715 and 3-910.

All creditors' claims are barred after three years from death. See Section 3-803(a)(2). Because of this, and since any possibility that letters may be issued at any time would be seen as a "cloud" on the title of heirs or devisees otherwise secure under 3-101, the three year statute of limitations applies to bar appointment of a personal representative after the basic period has passed. Section 83 of the Model Probate Code barred probate and administration after five years, and other statutes imposing time limits on these proceedings are cited at pp. 307-310 of the Model Probate Code. A qualification covers the situation where a closed administration is sought to be re-opened to administer after discovered assets. See Section 3-1008. If there has been no probate or appointment within three years, and if either exception to Section 3-102 applies, devisees under a late-discovered will may use a will to establish their title. But, they may not secure probate of the will, nor may they obtain appointment of a personal representative. The same pattern applies to heirs who, in a case where there has been no administration discover assets after the three year period has run. Such persons will not be able to protect purchasers with the ease of those interested in an estate where a personal representative has been appointed.

The basic premise underlying all of these time provisions is that interested persons who want to assume the risks implicit in the three-year period of limitations should be provided legitimate means by which they can do so. At the same time, parties should be afforded ample opportunity for earlier protection if they want it.

**15-3-109. Statutes of limitation on decedent's cause of action. —** No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of his death, shall apply to bar a cause of action surviving the decedent's death sooner than four (4) months after death. A cause of action which, but for this section, would have been barred less than four (4) months after death, is barred after four (4) months unless tolled. [I.C., § 15-3-109, as added by 1971, ch. 111, § 1, p. 233.]

**15-3-110. Delivery of will. [Repealed.]**

## STATUTORY NOTES

**Compiler's Notes. —** This section which comprised I.C., § 15-3-110, as added by S.L.

1971, ch. 111, § 1, was repealed by S.L. 1972, ch. 201, § 7.

**15-3-111. Joint probate on death of survivor of marriage dissolved by death.** — In cases in which a marital community has been dissolved by the death of either spouse at any time, the survivor was then entitled to all of the property of the decedent by will, law, or both, and the survivor died before any proceeding had been commenced for the probate of the estate of the spouse whose death occurred first, the estates of both decedents may be joined for probate in a single proceeding in any court having jurisdiction of the estate of the spouse whose death occurred last. The three (3) year provision of section 15-3-108, Idaho Code, applies only to the death of the spouse whose death occurred last. The initial application or petition filed in any such joint proceeding shall contain a statement of the facts upon which such joint proceeding is based, in addition to all other statements required by this code to be made therein. [1973, ch. 26, § 1, p. 50; am. 1995, ch. 168, § 1, p. 651.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" were added by S.L. 1973, ch. 26, § 1 and presumably refer to the Probate Code, generally compiled in chapters 1 through 7 of this title.

#### PART 2. VENUE FOR PROBATE AND ADMINISTRATION — PRIORITY TO ADMINISTER — DEMAND FOR NOTICE

**15-3-201. Venue for first and subsequent estate proceedings — Location of property.** — (a) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(1) In the county where the decedent had his domicile at the time of his death; or

(2) If the decedent was not domiciled in this state, in any county where property of the decedent was located at the time of his death.

(b) Venue for all subsequent proceedings within the exclusive jurisdiction of the court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in section 15-1-303 of this code or subsection (c) of this section.

(c) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

(d) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving nondomiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a nondomiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued. [I.C., § 15-3-201, as added by 1971, ch. 111, § 1, p. 233; am. 2009, ch. 11, § 4, p. 14.]



STATUTORY NOTES

**Cross References.** — Venue in cases of multiple proceedings, § 15-1-303.

**Amendments.** — The 2009 amendment, by ch. 11, in the introductory paragraph in subsection (a), substituted “proceedings” for “proceeding” and made minor grammatical

corrections in subsection (d).

**Compiler’s Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Effect of appointment.  
Nonresident decedents.

Effect of Appointment.

An order appointing an administrator by a probate court imports verity, and that there was sufficient evidence to establish the jurisdictional facts necessary to sustain the judgment. *In re Barr’s Estate*, 43 Idaho 400, 252 P. 676 (1927).

Admission by plaintiff, suing as administrator of decedent’s estate, that subsequent to commencement of suit he had, for jurisdictional considerations, sought and received an appointment as administrator from probate court of Bannock County was a judicial admission that deceased died a resident of that county. *Rogers v. Mellon*, 43 Idaho 466, 258 P. 166 (1927).

Nonresident Decedents.

Where a legatee of a will of a testator, in a foreign state, in turn by will left an interest in a legacy to his wife, who by will, left property to their children, and first testator’s legatee and his wife died before the payment of the original legacy, resort must be had to the courts of the state where the husband and wife resided to settle the estates of the original legatee and his wife. *In re Rothchild’s Estate*, 48 Idaho 485, 283 P. 598 (1929), cert.

denied, 281 U.S. 757, 50 S. Ct. 409, 74 L. Ed. 1167 (1930).

The appointment of an administrator is unauthorized where the counterclaim of a nonresident deceased defendant has been disallowed and no appeal taken. *Russell v. Bow*, 50 Idaho 264, 295 P. 437 (1931).

Court may appoint an administrator for decedent having no property in state, when he was plaintiff in a pending action surviving death, but not when he was defendant in such action. *Russell v. Bow*, 50 Idaho 264, 295 P. 437 (1931).

A court has no jurisdiction to appoint an administrator where a nonresident decedent leaves no property or right of property within the state. *Russell v. Bow*, 50 Idaho 264, 295 P. 437 (1931).

The probate court of Ada County did not have jurisdiction to appoint an administrator for a resident of California, who was killed in an automobile accident in Payette County, merely on the basis that the nonresident had left an asset in Idaho, to wit, an automobile liability insurance policy, and such appointment was void and subject to collateral attack. *Feil v. Dice*, 135 F. Supp. 851 (D. Idaho 1955).

RESEARCH REFERENCES

**Am. Jur.** — 77 Am. Jur. 2d, Venue, § 18.  
31 Am. Jur. 2d, Executors and Administra-

tors, §§ 99 et seq., 105, 119.  
**C.J.S.** — 95 C.J.S., Wills, § 529.

COMMENT TO OFFICIAL TEXT

Sections 1-303 and 3-201 cover the subject of venue for estate proceedings. Sections 3-202, 3-301, 3-303 and 3-309 also may be relevant.

Provisions for transfer of venue appear in Section 1-303.

The interplay of these several sections may be illustrated best by examples:

(1) A formal probate or appointment proceeding is initiated in A County. Interested persons who believe that venue is in B County rather than A County must raise their question about venue in A County, because 1-303 gives the Court in which the proceeding is first commenced authority to resolve disputes over venue. If the Court in A County errone-

ously determines that it has venue, the remedy is by appeal.

(2) An informal probate or appointment application is filed and granted without notice in A County. If interested persons wish to challenge the registrar's determination of venue, they may not simply file a formal proceeding in the county of their choice and thus force the proponent in the prior proceeding to debate the question of venue in their county. 3-201(b) locates the venue of any subsequent proceeding where the first proceeding occurred. The function of (b) is obvious when one thinks of subsequent proceedings as those which relate to claims or accounts, or to efforts to control a personal representative. It is less obvious when it seems to locate the forum for squabbles over venue at the place accepting the first informal application. Still, the applicant seeking an informal order must be careful about the statement he makes in his application because he may be charged with perjury under Section 1-310 if he is deliberately inaccurate. Moreover, the registrar must be satisfied that the allegations in the application support a finding of venue. 3-201(c) provides a remedy for one who is upset about the venue-locating impact of a

prior order in an informal proceeding and who does not wish to engage in full litigation about venue in the forum chosen by the other interested person unless he is forced to do so. Using it, he may succeed in getting the A County Court to transfer the proceedings to the county of his choice. He would be well advised to initiate formal proceedings if he gets the chance, for if he relies on informal proceedings, he, too, may be "bumped" if the judge in B County agrees with some movant that venue was not in B County.

(3) If the decedent's domicile was not in the state, venue is proper under 3-201 and 1-303 in any county where he had assets.

One contemplating starting administration because of the presence of local assets should have several other sections of the Code in mind. First, by use of the recognition provisions in Article IV [Chapter 4], it may be possible to avoid administration in any state other than that in which the decedent was domiciled. Second, Section 3-203 may apply to give priority for local appointment to the representative appointed at domicile. Third, under Section 3-309, informal appointment proceedings in this state will be dismissed if it is known that a personal representative has been previously appointed at domicile.

**15-3-202. Appointment or testacy proceedings — Conflicting claim of domicile in another state.** — If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this state must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state. [I.C., § 15-3-202, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Cross References.** — Foreign personal representatives, § 15-4-201.

#### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 751.  
31 Am. Jur. 2d, Executors and Administrators, §§ 120 et seq., 1065.

**C.J.S.** — 95 C.J.S., Wills, § 525.

**A.L.R.** — Probate, in state where assets are found, of will of nonresident which has not been admitted to probate, in state of testator's domicile. 20 A.L.R.3d 1033.

#### COMMENT TO OFFICIAL TEXT

This section is designed to reduce the possibility that conflicting findings of domicile in

two or more states may result in inconsistent administration and distribution of parts of



the same estate. Section 3-408 dealing with the effect of adjudications in other states concerning testacy supports the same general purpose to use domiciliary law to unify succession of property located in different states.

Whether testate or intestate, succession should follow the presumed wishes of the decedent whenever possible. Unless a decedent leaves a separate will for the portion of his estate located in each different state, it is highly unlikely that he would want different portions of his estate subject to different rules simply because courts reach conflicting conclusions concerning his domicile. It is pointless to debate whether he would prefer one or the other of the conflicting rules, when the paramount inference is that the decedent would prefer that his estate be unified under either rule rather than wasted in litigation.

The section adds very little to existing law. If a previous estate proceeding in State A has determined that the decedent was a domiciliary of A, persons who were personally before the court in A would be precluded by the principles of *res judicata* or collateral estoppel (and full faith and credit) from relitigating the issue of domicile in a later proceeding in State B. Probably, it would not matter in this setting that domicile was a jurisdictional fact. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938). Even if the parties to a present proceeding were not personally before the Court in an earlier proceeding in State A involving the same decedent, the prior judgment would be binding as to property subject to the power of the courts in A, on persons to whom due notice of the proceeding was given. *Riley v. New York Trust Co.*, 315 U.S. 343, 62 S. Ct. 608, 86 L. Ed. 885 (1942); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

Where a court learns that parties before it are also parties to previously initiated litigation involving a common question, traditional judicial reluctance to deciding unnecessary questions, as well as considerations of comity, are likely to lead it to delay the local proceedings to await the result in the other court. A somewhat more troublesome question is involved when one of the parties before the local court manifests a determination not to appear personally in the prior initiated proceedings so that he can preserve his ability to litigate contested points in a more friendly, or convenient, forum. But, the need to preserve all possible advantages available to particular litigants should be subordinated to the decedent's probable wish that his estate not be wasted in unnecessary litigation. Thus, the section requires that the local claimant either initiate litigation in the forum of his choice before litigation is started somewhere else, or accept the necessity of contesting unwanted views concerning the decedent's domicile offered in litigation pending elsewhere.

It is to be noted, in this connection, that the local suitor always will have a chance to contest the question of domicile in the other state. His locally initiated proceedings may proceed to a valid judgment accepting his theory of the case unless parties who would oppose him appear and defend on the theory that the domicile question is currently being litigated elsewhere. If the litigation in the other state has proceeded to judgment, Section 3-408 rather than the instant section will govern. If this section applies, it will mean that the foreign proceedings are still pending, so that the local person's contention concerning domicile can be made therein even though until the defense of litigation elsewhere is offered in the local proceedings, he may not have been notified of the foreign proceeding.

**15-3-203. Priority among persons seeking appointment as personal representative.** — (a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

- (1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;
- (2) the surviving spouse of the decedent who is a devisee of the decedent;
- (3) other devisees of the decedent;
- (4) the surviving spouse of the decedent;
- (5) other heirs of the decedent;
- (6) forty-five (45) days after the death of the decedent, any creditor;
- (7) if a petition for appointment of a personal representative has been filed and sixty (60) days have elapsed during which no consent to act has been filed by any proper person, the public administrator shall act as personal representative unless and until a proper person consents to act.



(b) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in subsection (a) of this section apply except that

(1) if the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;

(2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value, or, in default of this accord any suitable person.

(c) A person entitled to letters under (2) through (5) of subsection (a) of this section may nominate a qualified person to act as personal representative. Any person aged eighteen (18) and over may renounce his right to an appointment by appropriate writing filed with the court. When two (2) or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them, or in applying for appointment.

(d) Conservators of the estates of protected persons, or if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person, may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(e) Appointment of one who does not have priority, including priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary.

(f) No person is qualified to serve as a personal representative who is:

(1) under the age of eighteen (18);

(2) a person whom the court finds unsuitable in formal proceedings.

(g) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(h) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

(i) A married woman shall have the right to serve as personal representative. [I.C., § 15-3-203, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 8, p. 510.]

STATUTORY NOTES

**Cross References.** — Appointment of special administrator, § 15-3-614.  
Powers of personal representatives in general, § 15-3-711.

Termination of appointment of personal representative, § 15-3-608 et seq.

JUDICIAL DECISIONS

ANALYSIS

Mandatory priorities.  
Surviving spouse.

**Mandatory Priorities.**  
This section in establishing the priority for appointment of personal representatives is mandatory and not to be disregarded. *Shaw v. Bowman*, 101 Idaho 131, 609 P.2d 663 (1980).  
**Surviving Spouse.**  
The position of a surviving spouse that he be appointed as personal representative could

not be upheld on the theory that by reason of his claim for a family allowance that he was a creditor of the estate. *Shaw v. Bowman*, 101 Idaho 131, 609 P.2d 663 (1980).  
**Cited in:** In re Estate of Mattson, 99 Idaho 24, 576 P.2d 1058 (1978).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Ancillary administration.  
Application for appointment.  
Creditors.  
Discretion of court.  
Nomination.  
Partners.  
Priority.  
Public administrator.

**Ancillary Administration.**  
A person nominated and appointed as executor in another state, afterwards appointed administrator in Idaho, represents the estate in both jurisdictions. *Hilton v. Stewart*, 15 Idaho 150, 96 P. 579 (1908).  
**Application for Appointment.**  
Letters of administration must be granted to applicant unless person who has a better right thereto appears and asks for letters or nominates someone. In re *Daggett's Estate*, 15 Idaho 504, 98 P. 849 (1908).  
Persons entitled to administration must make application within a reasonable time, and, if they fail to make such application, letters should be granted to any qualified prior applicant. *Wright v. Merrill*, 26 Idaho 8, 140 P. 1101 (1914).

**Creditors.**  
Where widow, next of kin, and public administrator neglect to take out letters, creditor desiring to do so must exercise reasonable diligence and cannot without good cause defer making application until the statute of limitation has run, and then enforce his claim on theory that the statute was suspended on

account of the nonappointment of administrator. *Gwinn v. Melvin*, 9 Idaho 202, 72 P. 961 (1903).  
**Discretion of Court.**  
Former similar section meant to provide for appointment of any competent person upon the request of someone entitled thereto, where no application had been made by some person entitled to administer under the statute. It was a matter addressed to the sound discretion of court and was not an arbitrary or mandatory provision or requirement. In re *Daggett's Estate*, 15 Idaho 504, 98 P. 849 (1908).

**Nomination.**  
Where a person of kin nominates and requests the appointment of an administrator, until such petition is acted upon, such request may be withdrawn and the one of kin has the right to make application for the appointment of himself as administrator, and the former nomination and request are of no force and effect. *McCormick v. Brownell*, 25 Idaho 11, 136 P. 613 (1913).  
The law clearly grants to the person entitled to administration the power to select

some competent person to discharge the duties of administration, and the court is limited in its power by such request; and, if such person entitled to appointment applies for the appointment of a stranger or a person not of kin, the appointment depends wholly upon the request of the one who is of kin, if there is such kin, and such person of kin can control the appointment until the judge has acted upon the appointment by appointing the person so nominated, provided that such person must be a competent person under the law. *McCormick v. Brownell*, 25 Idaho 11, 136 P. 613 (1913).

The application of a nonresident brother and other heirs of the deceased does not give the person recommended by them a preference over any others entitled to appointment but further removed in priority. *Wright v. Merrill*, 26 Idaho 8, 140 P. 1101 (1914).

### Partners.

Member of a partnership is not entitled to appointment as administrator of the estate of deceased partner. *Miller v. Mitcham*, 21 Idaho 741, 123 P. 941 (1912).

### Priority.

Any person legally competent may be appointed administrator of an estate, if no one falling in the preferred classes desires appointment. *McCormick v. Brownell*, 25 Idaho 11, 136 P. 613 (1913).

A person who is not of kin to the deceased may be appointed administrator only when no

one of kin has made application who is a resident and competent and entitled to appointment or upon nomination or written request of the person entitled to appointment. *McCormick v. Brownell*, 25 Idaho 11, 136 P. 613 (1913).

A resident son of deceased has a priority of right of administration on the estate over nominee of the deceased's sister, who is a creditor, residing in another state. *Schwarze v. Logan*, 60 Idaho 251, 90 P.2d 692 (1939).

### Public Administrator.

By virtue of holding office of county treasurer, individual becomes public administrator and is, thereby, and for that reason alone, qualified to become an administrator of an estate. *In re Rice*, 12 Idaho 305, 85 P. 1109 (1906).

The public administrator of a county, which was the residence of decedent with known heirs in Sweden, could be appointed according to his classification under the priority statute, notwithstanding decedent died in another county. *Vaught v. Struble*, 63 Idaho 352, 120 P.2d 259 (1941).

The court properly granted letters of administration to the public administrator in preference to a special administrator who was seeking appointment as general administrator, where the public administrator appeared within a reasonable time to claim the issuance of letters to him as such public administrator. *Vaught v. Struble*, 63 Idaho 352, 120 P.2d 259 (1941).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 166 et seq., 192, 196, 1040.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 40 et seq.

**A.L.R.** — Capacity of infant to act as executor or administrator, and effect of improper appointment. 8 A.L.R.3d 590.

Eligibility of foreign corporation to appointment as executor, administrator, or testamen-

tary trustee. 26 A.L.R.3d 1019.

Physical condition as affecting competency to act as executor or administrator. 71 A.L.R.3d 675.

Right in appointment of administrator to pass over eligible person interested in estate and appoint a stranger. 84 A.L.R.3d 707.

Adverse interest or portion as disqualification for appointment of administrator, executor, or other. 11 A.L.R.4th 638.

## COMMENT TO OFFICIAL TEXT

The priorities applicable to informal proceedings are applicable to formal proceedings. However, if the proceedings are formal, a person with a substantial interest may object to the selection of one having priority other than because of will provisions. The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the court, and a judge capable of handling discretionary matters, will be involved.

In considering this section as it relates to a

devise to a trustee for various beneficiaries, it is to be noted that "interested persons" is defined by 1-201(20) [(25)] to include fiduciaries. Also, 1-403(2) [15-1-403(b)] and 3-912 show a purpose to make trustees serve as representatives of all beneficiaries. The provision in (d) is consistent.

If a state's statutes recognize a public administrator or public trustee as the appropriate agency to seek administration of estates in which the state may have an interest, it would be appropriate to indicate in this sec-



tion the circumstances under which such an officer may seek administration. If no officer is recognized locally, the state could claim as heir by virtue of 2-105.

Subsection (g) was inserted in connection with the decision to abandon the effort to describe ancillary administration in Article IV [Chapter 4]. Other provisions in Article III [Chapter 3] which are relevant to administration of assets in a state other than that of the decedent's domicile are 1-301 (territorial ef-

fect), 3-201 (venue), 3-308 (informal appointment for non-resident decedent delayed 30 days), 3-309 (no informal appointment here if a representative has been appointed at domicile), 3-815 (duty of personal representative where administration is more than one state) and 4-201 — 4-205 (local recognition of foreign personal representatives).

The meaning of "spouse" is determined by Section 2-802.

**15-3-204. Demand for notice of order or filing concerning decedent's estate.** — Any person desiring notice of any order or filing pertaining to a decedent's estate in which he has a financial or property interest, may file a demand for notice with the court at any time after the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant's address or that of his attorney. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in section 15-1-401 of this code to the demandant or his attorney. The validity of an order which is issued or filing which is accepted without compliance with this requirement shall not be affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate. [I.C., § 15-3-204, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

JUDICIAL DECISIONS

**Cited in:** *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981); *State, Dept. of Health & Welfare v. Estate of Elliott* (In re Estate of Elliott), 141 Idaho 177, 108 P.3d 324 (2005).

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 155, 156, 494.

COMMENT TO OFFICIAL TEXT

The notice required as the result of demand under this section is regulated as far as time and manner requirements are concerned by Section 1-401.

This section would apply to any order which might be made in a supervised administration proceeding.

## PART 3. INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS

**15-3-301. Informal probate or appointment proceedings — Application — Contents.** — Applications for informal probate, informal statement of intestacy where the estate is community and there is a surviving spouse, or informal appointment shall be directed to the registrar, and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the following information:

(a) Every application for informal probate of a will, informal statement of intestacy where the estate is community and there is a surviving spouse, or for informal appointment of a personal representative, other than a special, ancillary or successor representative, shall contain the following:

- (1) A statement of the interest of the applicant;
- (2) The name, and date of death of the decedent, his age, and the county and state of his domicile at the time of death, and the names and addresses of the spouse, children, heirs and devisees and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;
- (3) If the decedent was not domiciled in the state at the time of his death, a statement showing venue;
- (4) A statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated;
- (5) A statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere;
- (6) If the application is for an informal statement of intestacy of a community estate where there is a surviving spouse, an affidavit of the surviving spouse or someone acting on behalf of the surviving spouse that there is no will, that the decedent's estate consists solely of community property of the decedent and surviving spouse, that he or she is the surviving spouse, and a request for a statement that there is no will, that all assets are community and that the surviving spouse is the sole heir;
- (7) That the time limit for informal probate or appointment as provided in this article has not expired either because three (3) years or less have passed since the decedent's death, or, if more than three (3) years from death have passed, that circumstances as described by section 15-3-108 of this code authorizing tardy probate appointment have occurred.

(b) An application for informal probate of a will shall state the following in addition to the statements required by subsection (a) of this section:

- (1) That the original of the decedent's last will is in the possession of the court, or accompanies the application, or that a certified copy of a will probated in another jurisdiction accompanies the application;
- (2) That the applicant, to the best of his knowledge, believes the will to have been validly executed;
- (3) That after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant

believes that the instrument which is the subject of the application is the decedent's last will.

(c) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address and priority for appointment of the person whose appointment is sought.

(d) An application for informal appointment of an administrator in intestacy shall state in addition to the statements required by subsection (a) of this section:

(1) That after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this state under section 15-1-301 of this code, or, a statement why any such instrument of which he may be aware is not being probated;

(2) The priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under section 15-3-203 of this code.

(e) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

(f) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in subsection (c) of section 15-3-610 of this code, or whose appointment has been terminated by death or removal, shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.

(g) By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against him.

(h) Any statement entered upon an application for informal statement of intestacy where the estate is community and there is a surviving spouse shall contain a statement of heirship setting out the heirs of the decedent and shall have the same effect as entry of a statement of informal probate of a will and be subject to the limitation periods set out in section 15-3-108, Idaho Code, notwithstanding the exception provided in that section for determining heirs of an intestate. [I.C., § 15-3-301, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. 1978, ch. 350, § 10, p. 914; am. 1995, ch. 166, § 1, p. 648.]



### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

**Effective Dates.** — Section 2 of S.L. 1995, ch. 166 declared an emergency. Approved March 16, 1995.

### JUDICIAL DECISIONS

#### Ex Parte Proceedings.

Where a person applies to probate court for informal appointment as a personal representative, the process initiated pursuant to this section is ex parte in that no notice of the application is generally required, and where the estate letter is issued to the personal representative, the requirement of § 15-3-

303A that notice be given to the heirs and devisees does not apply; however, since the partial exclusion of notice in § 15-3-303A is due to a related notice requirement in § 15-3-705, applicable upon appointment, notice still was required under § 15-3-705. *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 8, 122, 237 et seq., 257 et seq.

79 Am. Jur. 2d, Wills, § 737 et seq.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 63 et seq.

95 C.J.S., Wills, §§ 445, 818.

### COMMENT TO OFFICIAL TEXT

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see Article I [Chapter 1]). The section is believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrong doing.

Section 1-310 deals with verification.

In 1975, the Joint Editorial Board recommended the addition of subsection (b) [(g)] to reflect an improvement accomplished in the first enactment in Idaho. The addition, which

is a form of long-arm provision that affects everyone who acts as an applicant in informal proceedings, in conjunction with Section 1-106 provides a remedy in the Court against anyone who might make known misstatements in an application. The addition is not needed in the case of an applicant who becomes a personal representative as a result of his application for the implied consent provided in Section 3-602 would cover the matter. Also, the requirement that the applicant state that time limits on informal probate and appointment have not run, formerly appearing as (iv) [(4)] under paragraph (2) [(b)] was expanded to refer to informal appointment and moved into (1) [(a)]. Correcting an oversight in the original text, this change coordinates the statements required in an application with the limitations provisions of Section 3-108.

**15-3-302. Informal probate — Duty of registrar — Effect of informal probate.** — Upon receipt of an application requesting informal probate of a will or informal statement of intestacy, the registrar, upon making the findings required by section 15-3-303 of this chapter shall issue a written statement of informal probate if at least five (5) days have elapsed since the decedent's death. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void. [I.C., § 15-3-302, as added by 1971, ch. 111,

§ 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. 1973, ch. 167, § 8, p. 319.]

### JUDICIAL DECISIONS

**Cited in:** *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

### COMMENT TO OFFICIAL TEXT

Model Probate Code Sections 68 and 70 contemplate probate by judicial order as the only method of validating a will. This “umbrella” section and the sections it refers to describe an alternative procedure called “informal probate.” It is a statement of probate by the Registrar. A succeeding section describes cases in which informal probate is to be denied. “Informal probate” is subjected to safeguards which seem appropriate to a

transaction which has the effect of making a will operative and which may be the only official reaction concerning its validity. “Informal probate,” it is hoped, will serve to keep the simple will which generates no controversy from becoming involved in truly judicial proceedings. The procedure is very much like “probate in common form” as it is known in England and some states.

#### **15-3-303. Informal probate — Proof and findings required. —**

(a) In an informal proceeding for original probate of a will or informal statement of intestacy where the estate is community and there is a surviving spouse, the registrar shall determine whether:

- (1) the application is complete;
- (2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (3) the applicant appears from the application to be an interested person as defined in subsection (24) [(25)] of section 15-1-201 of this code;
- (4) on the basis of the statements in the application, venue is proper;
- (5) an original, duly executed and apparently unrevoked will is in the registrar’s possession;
- (6) any notice required by section 15-3-204 of this code has been given and that the application is not within section 15-3-304 of this part; and
- (7) it appears from the application that the time limit for original probate has not expired;
- (8) if the application is for a statement of intestacy of a community estate with a surviving spouse, on the basis of statements in the application and affidavit: 1. the decedent left no will, 2. the decedent’s estate consists solely of community property of the decedent and the surviving spouse, and 3. the decedent left a surviving spouse. In addition to this, the registrar shall set out the name of the surviving spouse.

(b) The application shall be denied if it indicates that a personal representative has been appointed in another county of this state or except as provided in subsection (d) of this section, if it appears that this or another will of the decedent has been the subject of a previous probate order.

(c) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under section 15-2-502, 15-2-503 or 15-2-506 of this code have been met shall be probated without further proof. In other cases, the registrar may assume execution if the will appears to have been properly executed, or he

may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(d) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(e) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (a) of this section, may be probated in this state upon receipt by the registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place. [I.C., § 15-3-303, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. 1973, ch. 167, § 19, p. 319.]

#### STATUTORY NOTES

**Compiler's Notes.** — The bracketed insertion in paragraph (a)(3) was added by the compiler to correct the statutory reference.

The words "this code" refer to the Uniform

Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

#### JUDICIAL DECISIONS

**Cited in:** *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

#### COMMENT TO OFFICIAL TEXT

The purpose of this section is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with "pre-proved" wills in some states. If a will is "pre-proved" as provided in Article II [Chapter 2], it will, of course, "appear" to be well executed and include the recital necessary for easy probate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the

strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings. See Section 3-402. Under Section 3-401, pendency of formal probate proceedings blocks informal probate or appointment proceedings.

**15-3-303A. Notice required.** — Upon issuance of a statement of informal probate if no letters are issued to a personal representative or determination of heirship of community property, the applicant must give notice to all heirs and devisees of the admission of the will to probate or the determination of heirship of community property. This information shall be sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. The applicant shall be responsible to any heir or devisee damaged by failure of the applicant to give proper notice under this section. [I.C., § 15-3-303A, as added by 1972, ch. 201, § 9, p. 510; am. 1973, ch. 167, § 9, p. 319.]



## JUDICIAL DECISIONS

**Notice in Informal Proceeding.**

Where a person applies to probate court for informal appointment as a personal representative, the process initiated pursuant to § 15-3-301 is ex parte in that no notice of the application is generally required, and where the estate letter is issued to the personal representative, the requirement of this sec-

tion that notice be given to the heirs and devisees does not apply, however, since the partial exclusion of notice in this section is due to a related notice requirement in § 15-3-705, applicable upon appointment, notice still was required under § 15-3-705. *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

**15-3-303B. In personam jurisdiction. [Repealed.]**

## STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 15-3-303B, as added by 1972, ch. 201, § 10, p. 510, was repealed by S.L. 1978, ch. 350, § 11.

**15-3-304. Informal probate — Unavailable in certain cases.** — Applications for informal probate which relate to one or more of a known series of testamentary instruments (other than wills and codicils), the latest of which does not expressly revoke the earlier, shall be declined. [I.C., § 15-3-304, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

## COMMENT TO OFFICIAL TEXT

The Registrar handles the informal proceeding, but is required to decline applications in certain cases where circumstances

suggest that formal probate would provide desirable safeguards.

**15-3-305. Informal probate — Registrar not satisfied.** — If the registrar is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of sections 15-3-303 and 15-3-304 of this Part or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings. [I.C., § 15-3-305, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

**Cited in:** *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

## COMMENT TO OFFICIAL TEXT

The purpose of this section is to recognize that the Registrar should have some authority to deny probate to an instrument even though all stated statutory requirements may

be said to have been met. Denial of an application for informal probate cannot be appealed. Rather, the proponent may initiate a formal proceeding so that the matter may be

brought before the judge in the normal way for contested matters.

**15-3-306. Informal probate — Notice requirements.** — The moving party must give notice as described by section 15-1-401 of this code of his application for informal probate (1) to any person demanding it pursuant to section 15-3-204 of this code; and (2) to any personal representative of the decedent whose appointment has not been terminated. No other notice of informal probate is required. [I.C., § 15-3-306, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

#### JUDICIAL DECISIONS

**Cited in:** Cahoon v. Seaton, 102 Idaho 542, 633 P.2d 607 (1981).

#### COMMENT TO OFFICIAL TEXT

This provision assumes that there will be a single office within each county or other area of jurisdiction of the probate court which can be checked for demands for notice relating to estates in that area. If there are or may be

several registrars within a given area, provision would need to be made so that information concerning demands for notice might be obtained from the chief registrar's place of business.

**15-3-307. Informal appointment proceedings — Delay in order — Duty of registrar — Effect of appointment.** — (a) Upon receipt of an application for informal appointment of a personal representative other than a special administrator as provided in section 15-3-614 of this code, if at least one hundred twenty (120) hours have elapsed since the decedent's death, the registrar, after making the findings required by section 15-3-308 of this chapter, shall appoint the applicant subject to qualification and acceptance; provided, that if the decedent was a nonresident, the registrar shall delay the order of appointment until thirty (30) days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this state.

(b) The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in sections 15-3-608 through 15-3-612 of this code, but is not subject to retroactive vacation. [I.C., § 15-3-307, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapter 1 through 7 of this title.

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 237 et seq.

## COMMENT TO OFFICIAL TEXT

Section 3-703 describes the duty of a personal representative and the protection available to one who acts under letters issued in informal proceedings. The provision requiring a delay of 30 days from death before appoint-

ment of a personal representative for a non-resident decedent is new. It is designed to permit the first appointment to be at the decedent's domicile. See Section 3-203.

**15-3-308. Informal appointment proceedings — Proof and findings required.** — (a) In informal appointment proceedings, the registrar must determine whether:

- (1) the application for informal appointment of a personal representative is complete;
- (2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (3) the applicant appears from the application to be an interested person as defined in subsection (24) [(25)] of section 15-1-201 of this code;
- (4) on the basis of the statements in the application, venue is proper;
- (5) any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;
- (6) any notice required by section 15-3-204 of this code has been given;
- (7) from the statements in the application, the person whose appointment is sought has priority entitling him to the appointment.

(b) Unless section 15-3-612 of this code controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in subsection (c) of section 15-3-610 of this code has been appointed in this or another county of this state, that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met. [I.C., § 15-3-308, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 20, p. 319.]



## STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

The words enclosed in parentheses so appeared in the law as enacted.

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 237 et seq.

## COMMENT TO OFFICIAL TEXT

Sections 3-614 and 3-615 make it clear that a special administrator may be appointed to conserve the estate during any period of delay in probate of a will. Even though the will has not been approved, Section 3-614 gives priority for appointment as special administrator to the person nominated by the will which has been offered for probate. Section 3-203 governs priorities for appointment. Under it, one or more of the same class may receive priority

through agreement of the others.

The last sentence of the section is designed to prevent informal appointment of a personal representative in this state when a personal representative has been previously appointed at the decedent's domicile. Sections 4-204 and 4-205 may make local appointment unnecessary. Appointment in formal proceedings is possible, however.

**15-3-309. Informal appointment proceedings — Registrar not satisfied.** — If the registrar is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of sections 15-3-307 and 15-3-308 of this Part, or for any other reason, he may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings. [I.C., § 15-3-309, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 237 et seq.

## COMMENT TO OFFICIAL TEXT

Authority to decline an application for appointment is conferred on the Registrar. Appointment of a personal representative confers broad powers over the assets of a

decedent's estate. The process of declining a requested appointment for unclassified reasons should be one which a registrar can use quickly and informally.

**15-3-310. Informal appointment proceedings — Notice requirements.** — The moving party must give notice as described by section 15-1-401 of this code of his intention to seek an appointment informally: (1) to any person demanding it pursuant to section 15-3-204 of this code; and (2) to any person having a prior or equal right to appointment not waived in writing and filed with the court. No other notice of an informal appointment proceeding is required. [I.C., § 15-3-310, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler’s Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 255.

**15-3-311. Informal appointment unavailable in certain cases.** — If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this state, and which is not filed for probate in this court, the registrar shall decline the application. [I.C., § 15-3-311, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 237 et seq., 258.

PART 4. FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

**15-3-401. Formal testacy proceedings — Nature — When commenced.** — A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in subsection (a) of section 15-3-402 of this Part in which he requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or to set aside a determination that the entire estate is community and there is a surviving spouse, or a petition in accordance with subsection (c) of section 15-3-402 of this Part for an order that the decedent died intestate.

A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

During the pendency of a formal testacy proceeding, the registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining

the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

By submitting a petition for formal probate the petitioner subjects himself to jurisdiction of the court in which such instrument is filed. Any action by a person damaged by him, including a creditor of the estate, shall be limited in amount to the assets of the estate less the obligations of the estate paid by him. Notice of any proceedings sought to be maintained against the petitioner pursuant to his submission to jurisdiction shall be delivered to him or mailed to him by ordinary first class mail at his address as it is known to the petitioner, or is listed on any application or petition in probate proceedings previously instituted in the court where the proceeding is brought. [I.C., § 15-3-401, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 11, p. 510.]

### STATUTORY NOTES

**Cross References.** — Appeal of probate proceedings. I.A.R. 11(b).

### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 728.  
31 Am. Jur. 2d, Executors and Administrators, §§ 239 et seq., 248, 261.

**C.J.S.** — 95 C.J.S., Wills, §§ 445, 818.

**A.L.R.** — Necessity that executor or administrator be represented by counsel in present-

ing matters in probate court. 19 A.L.R.3d 1104.

Right to probate subsequent discovered will as affected by completed prior proceedings in intestate administration. 2 A.L.R.4th 1315.

### COMMENT TO OFFICIAL TEXT

The word “testacy” is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that he left no will, any question of which of several instruments is his valid will, and the possibility that he died intestate as to a part of his estate, and testate as to the balance. See Section 1-201 (44) [§ 15-1-201(52)].

The formal proceedings described by this section may be: (i) an original proceeding to secure “solemn form” probate of a will; (ii) a proceeding to secure “solemn form” probate to corroborate a previous informal probate; (iii) a proceeding to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) a proceeding to contradict a previous order of informal probate; (v) a proceeding to secure a declaratory judgment of intestacy and a determination of heirs in a case where no will has been offered. If a pending informal application for probate is blocked by a formal proceeding, the applicant may withdraw his

application and avoid the obligation of going forward with prima facie proof of due execution. See Section 3-407. The petitioner in the formal proceedings may be content to let matters stop there, or he can frame his petition, or amend, so that he may secure an adjudication of intestacy which would prevent further activity concerning the will.

If a personal representative has been appointed prior to the commencement of a formal testacy proceeding, the petitioner must request confirmation of the appointment to indicate that he does not want the testacy proceeding to have any effect on the duties of the personal representative, or refrain from seeking confirmation, in which case, the proceeding suspends the distributive power of the previously appointed representative. If nothing else is requested or decided in respect to the personal representative, his distributive powers are restored at the completion of the proceeding, with Section 3-703 directing him to abide by the will. “Distribute” and



“distribution” do not include payment of claims. See 1-201(10) [§ 15-1-201(12)], 3-807 and 3-902.

**15-3-402. Formal testacy or appointment proceedings — Petition — Contents.** — (a) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing and contain further statements as indicated in this section. A petition for formal probate of a will:

- (1) requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;
- (2) contains the statements required for informal applications as stated in subsection (a)(1) through (5) of section 15-3-301 of this code, the statements required by subsection (b)(1) and (2) of section 15-3-301 of this code; and
- (3) states whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

(b) If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.

(c) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by subsection[s] (a) and (d) of section 15-3-301 of this code and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subsection (d)(2) of section 15-3-301 of this code may be omitted. [I.C., § 15-3-402, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler’s Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title. The bracketed “s” in subsection (c) was inserted by the compiler.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

- Amendments.
- False statements.
- Proof of death.

**Amendments.**

The allowance of amendments in a will contest is largely within the discretion of the trial court. *Schwarz v. Taeger*, 44 Idaho 625, 258 P. 1082 (1927).

**False Statements.**

Complaint, which alleged that defendant was appointed administrator of estate under a petition signed by defendant stating that as far as he knew he was the only heir, when, as a matter of fact, he knew that the plaintiffs were heirs, and that defendant though knowing the addresses of the plaintiffs failed to

advise the plaintiffs as to the true value of the estate, and thereafter had the assets in the estate transferred to himself as sole heir stated an equitable cause of action against the defendant. *Gerlach v. Schultz*, 72 Idaho 507, 244 P.2d 1095 (1952).

**Proof of Death.**

At the hearing on the application for the appointment as administrator of an estate, the applicant must prove the death of the deceased. *McCormick v. Brownell*, 25 Idaho 11, 136 P. 613 (1913).

**RESEARCH REFERENCES**

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 739.  
31 Am. Jur. 2d, Executors and Administrators, § 239 et seq.

**C.J.S.** — 33 C.J.S., Executors and Administrators, §§ 70, 71.

**A.L.R.** — Lost will, proof of nonrevocation

in proceeding to establish. 18 A.L.R.3d 606; 86 A.L.R.3d 980; 70 A.L.R.4th 323.

Probate of copy of lost will as precluding later contest of will under doctrine of res judicata. 55 A.L.R.3d 755.

**COMMENT TO OFFICIAL TEXT**

If a petitioner seeks an adjudication that a decedent died intestate, he is required also to obtain a finding of heirship. A formal proceeding which is to be effective on all interested persons must follow reasonable notice to such persons. It seems desirable to force the proceedings through a formal determination of heirship because the finding will bolster the order, as well as preclude later questions that might arise at the time of the distribution.

Unless an order of supervised administration is sought, there will be little occasion for a formal order concerning appointment of a

personal representative which does not also adjudicate the testacy status of the decedent. If a formal order of appointment is sought because of disagreement over who should serve, Section 3-414 describes the appropriate procedure.

The words "otherwise unavailable" in subsection (b) are not intended to be read restrictively.

Section 1-310 expresses the verification requirement which applies to all documents filed with the Courts.

**15-3-403. Formal testacy proceeding — Notice of hearing on petition.** — (1) Upon commencement of a formal testacy proceeding, the court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by section 15-1-401 of this code by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under section 15-3-204 of this code.

Notice shall be given to the following persons: the surviving spouse, children, and other heirs of the decedent, the devisees and executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons.

(2) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered mail to the alleged decedent at his last known address. The court shall direct the petitioner to report the results of, or make and

report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

- (a) By inserting in one (1) or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;
- (b) By notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;
- (c) By engaging the services of an investigator. The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration. [I.C., § 15-3-403, as added by 1971, ch. 111, § 1, p. 233; am. 2008, ch. 75, § 1, p. 200.]

STATUTORY NOTES

**Cross References.** — Notice, method and time of giving, § 15-1-401.  
Notice, waiver of, § 15-1-402.  
**Amendments.** — The 2008 amendment, by ch. 75, redesignated subsections; in the second paragraph in subsection (1), deleted the last sentence, which read: “In addition, the petitioner shall give notice by publication to all unknown persons and to all known

persons whose addresses are unknown who have any interest in the matters being litigated.” See § 15-1-401(a)(3).  
**Compiler’s Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

**Proof of Death.**  
The requirement of proof of death is complied with where two separate applications are made and filed for appointment of two different persons as administrator, and both

petitions allege the death of testator and the evidence supports the allegations. *McCormick v. Brownell*, 25 Idaho 11, 136 P. 613 (1913).

RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 734.  
**C.J.S.** — 95 C.J.S., Wills, § 553 et seq.  
**A.L.R.** — Duty and liability of executor

with respect to locating and notifying legatees, devisees, or heirs. 10 A.L.R.3d 547.

COMMENT TO OFFICIAL TEXT

Provisions governing the time and manner of notice required by this section and other sections in the Code are contained in 1-401.  
The provisions concerning search for the alleged decedent are derived from Model Probate Code, Section 71.  
Testacy proceedings involve adjudications that no will exists. Unknown wills as well as any which are brought to the attention of the Court are affected. Persons with potential interests under unknown wills have the notice afforded by death and by publication. Notice requirements extend also to persons named in a will that is known to the petition-

ers to exist, irrespective of whether it has been probated or offered for formal or informal probate, if their position may be affected adversely by granting of the petition. But, a rigid statutory requirement relating to such persons might cause undue difficulty. Hence, the statute merely provides that the petitioner may notify other persons.  
It would not be inconsistent with this section for the Court to adopt rules designed to make petitioners exercise reasonable diligence in searching for as yet undiscovered wills.  
Section 3-106 provides that an order is



valid as to those given notice, though less than all interested persons were given notice. Section 3-1001(b) provides a means of extend-

ing a testacy order to previously unnotified persons in connection with a formal closing.

**15-3-404. Formal testacy proceedings — Written objections to probate.** — Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will. [I.C., § 15-3-404, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 817 et seq.

**C.J.S.** — 95 C.J.S., Wills, §§ 567, 568.

**A.L.R.** — Right of action for malicious contest of will. 35 A.L.R.3d 651.

Right of heir's assignee to contest will. 39 A.L.R.3d 696.

Modern status: inheritability or descendability of right to contest will. 11 A.L.R.4th 907.

Estoppel to contest will or attack its validity. 78 A.L.R.4th 90.

### COMMENT TO OFFICIAL TEXT

Model Probate Code section 72 requires a contestant to file written objections to any will he would oppose. The provision prevents potential confusion as to who must file what

pleading that can arise from the notion that the probate of a will is in rem. The petition for probate of a revoking will is sufficient warning to proponents of the revoked will.

**15-3-405. Formal testacy proceedings — Uncontested cases — Hearings and proof.** — If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of section 15-3-409 of this Part have been met, or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one (1) of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit. [I.C., § 15-3-405, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Mistake as to hearing date.  
Prima facie proof.

#### Mistake as to Hearing Date.

Misapprehension on part of petitioner's counsel as to the time when the hearing would be held is sufficient to set aside trial court's default orders, where he honestly, though mistakenly, thought that case was to be heard at a later date, took reasonably prompt action when he learned trial had been had in his absence, and no request under this section had been made. In re Henry's Estate,

70 Idaho 108, 212 P.2d 393 (1949).

#### Prima Facie Proof.

Evidence showing that the statutes governing due execution of the will have been complied with entitle such will to be probated as the last will of the testator in the absence of a contest or a showing to the contrary. Head v. Nixon, 22 Idaho 765, 128 P. 557 (1912).

RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 828 et seq.

**C.J.S.** — 95 C.J.S., Wills, § 578 et seq.

COMMENT TO OFFICIAL TEXT

For various reasons, attorneys handling estates may want interested persons to be gathered for a hearing before the Court on the formal allowance of the will. The Court is not required to conduct a hearing, however.

If no hearing is required, uncontested formal probates can be completed on the strength of the pleadings. There is no good

reason for summoning attestors when no interested person wants to force the production of evidence on a formal probate. Moreover, there seems to be no valid distinction between litigation to establish a will, and other civil litigation, in respect to whether the court may enter judgment on the pleadings.

**15-3-406. Formal testacy proceedings — Contested cases — Testimony of attesting witnesses.** — (a) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one (1) of the attesting witnesses, if within the state competent and able to testify, is required. Due execution of an attested or unattested will may be proved by other evidence.

(b) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery. [I.C., § 15-3-406, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 12, p. 510.]

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

- Construction of will.
- Costs.
- Proof of will.
- Right to open and close.
- Subsequent declaration of testator.
- Testamentary capacity.

**Construction of Will.**

The court's authority to construe a will creating a trust to buy and equip a Youth Center was unquestioned on appeal, although generally in a will contest proceeding the issues presented to the court relate only to the proof of facts relating to the execution of the will and may not relate to a construction of the terms of the will. *Sawyer v. Huff*, 86 Idaho 328, 386 P.2d 563 (1963).

**Costs.**

Costs in an action contesting validity of a will cannot be awarded until final determination of the case, and each party will be required to pay his own costs subject to recovery

dependent upon the final outcome. *Schwarz v. Taeger*, 44 Idaho 625, 258 P. 1082 (1927).

**Proof of Will.**

Where an attesting witness undertakes to impeach the will, his testimony should be received with the utmost caution. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

Law requires examination of subscribing witnesses if they are present in county, but it does not make their testimony conclusive. Testimony of other witnesses is admissible to establish due execution of will. In *re Gordon's Estate*, 48 Idaho 171, 279 P. 625 (1929).

In a proceeding to contest a will, evidence showing that the testator called in the sub-

scribing witnesses and asked them to witness his signature thereto immediately followed by production of the will, its subscription by the testator, and an attestation by the subscribing witnesses is sufficient to show compliance with the law respecting the execution of a will. *In re Gordon's Estate*, 48 Idaho 171, 279 P. 625 (1929).

The relationship between will contestant and decedent as bearing upon whether decedent would probably have made a will revoking the first, and whether decedent's attitude toward contestant has changed from the time of making the former will, is relevant and evidence on such relationship is admissible. *In re Brown's Estate*, 52 Idaho 286, 15 P.2d 604 (1932).

### Right to Open and Close.

Proponents of will held not to have right of opening and closing. *Schwarz v. Taeger*, 44 Idaho 625, 258 P. 1082 (1927).

### Subsequent Declaration of Testator.

The declarations of a testator, after the

execution of a will, showing his dissatisfaction therewith and his intention to execute a new will, are not admissible to show that the said will was not executed, and a will cannot generally be impeached by the subsequent oral declarations of the testator. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

### Testamentary Capacity.

In a will contest, evidence to the effect that decedent was not able to transact ordinary business was prejudicial where there is no instruction to the effect that one might possess testamentary capacity even though unable to transact ordinary business. *Schwarz v. Taeger*, 44 Idaho 625, 258 P. 1082 (1927).

In an action contesting the validity of a will, letters in the handwriting of the deceased, properly identified, should be received in evidence as bearing upon the condition of his mind. *Schwarz v. Taeger*, 44 Idaho 625, 258 P. 1082 (1927).

## RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 828 et seq.

**C.J.S.** — 95 C.J.S., Wills, § 578 et seq.

**A.L.R.** — Presumption or inference of undue influence from testamentary gift to relative, friend, or associate of person preparing will or procuring its execution. 13 A.L.R.3d 381.

Necessity of laying foundation for opinion of attesting witness as to mental condition of testator or testatrix. 17 A.L.R.3d 503.

Undue influence in gift to testator's attorney. 19 A.L.R.3d 575.

Solicitation of testator to make will or spec-

ify bequest as undue influence. 48 A.L.R.3d 961.

Probate of copy of lost will as precluding later contest of will under doctrine of *res judicata*. 55 A.L.R.3d 755.

May parts of will be upheld notwithstanding failure of other parts for lack of testamentary capacity or undue influence. 64 A.L.R.3d 261.

Existence of illicit or unlawful relation between testator and beneficiary as evidence of undue influence. 76 A.L.R.3d 743.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings. 53 A.L.R.4th 561.

## COMMENT TO OFFICIAL TEXT

Model Probate Code section 76, combined with section 77, substantially unchanged. The self-proved will is described in Article II [Chapter 2]. See Section 2-504. The "conclusive presumption" described here would foreclose questions such as whether the witnesses signed in the presence of the testator. It would

not preclude proof of undue influence, lack of testamentary capacity, revocation or any relevant proof that the testator was unaware of the contents of the document. The balance of the section is derived from Model Probate Code sections 76 and 77.

**15-3-407. Formal testacy proceedings — Burdens in contested cases.** — In contested cases, petitioners who seek to establish intestacy have the burden of establishing *prima facie* proof of death, venue, and heirship. Proponents of a will have the burden of establishing *prima facie* proof of due execution in all cases, and, if they are also petitioners, *prima facie* proof of death and venue. Contestants of a will have the burden of



establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate. [I.C., § 15-3-407, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Burden of proof.  
Evidence.  
Testamentary capacity.  
Undue influence.

#### Burden of Proof.

Where a contest is filed in opposition to the probating of a will and both the petition to probate and the opposition are tried at the same time, and at the hearing proof is offered by the proponent of the will showing a due execution thereof, the burden of proof is then upon the contestant to meet, overturn, and disprove the prima facie case made by the proponent. *Head v. Nixon*, 22 Idaho 765, 128 P. 557 (1912).

The contestant of a will that has been admitted to probate has the burden of showing undue influence and that burden never shifts to the proponent of a will. *Swaringen v. Swanstrom*, 67 Idaho 245, 175 P.2d 692 (1946).

In action to contest a will already admitted to probate, the defendants are not required to establish necessary facts to admit will to probate since burden of proof is on contestants to proceed and to sustain the burden of proof. In *re Lunders' Estate*, 74 Idaho 448, 263 P.2d 1002 (1953).

Contestants of a will on the basis of incompetency of the testatrix are the plaintiffs in such a case and, as such, must sustain the burden of proof of their affirmative claim. In *re Goan's Estate*, 83 Idaho 568, 366 P.2d 831 (1961).

Where contention was that the testatrix was incompetent at the time she executed her will, an inference, arising from testatrix' illness of high blood pressure and age of 81 years and from the fact that subsequent to the

execution of her will she was less alert, that she was incompetent at the time of the execution of the will was insufficient to sustain the burden of the proof or the verdict. In *re Goan's Estate*, 83 Idaho 568, 366 P.2d 831 (1961).

#### Evidence.

There is no provision which prescribes the evidence required upon a hearing of a contest of a will except the general rule, which applies to all actions brought in a court having jurisdiction, that facts alleged in pleadings are true. *Head v. Nixon*, 22 Idaho 765, 128 P. 557 (1912).

#### Testamentary Capacity.

Testamentary capacity is a question of fact to be determined on the evidence in the individual case. In *re Goan's Estate*, 83 Idaho 568, 366 P.2d 831 (1961).

#### Undue Influence.

No presumption of undue influence arises on the mere existence of a confidential relationship between beneficiary and testator in relationship, or business or professional work, during the lifetime of the testator. *Swaringen v. Swanstrom*, 67 Idaho 245, 175 P.2d 692 (1946).

In a contest on the ground of undue influence, it must be shown that such undue influence existed and was operating at the time of the execution of the will. *Swaringen v. Swanstrom*, 67 Idaho 245, 175 P.2d 692 (1946).

## RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, §§ 831, 832.

**C.J.S.** — 95 C.J.S., Wills, § 578 et seq.

**A.L.R.** — Presumption or inference of un-

due influence from testamentary gift to relative, friend, or associate of person preparing will or procuring its execution. 13 A.L.R.3d 381.

Testator's failure to make new will, following loss of original will by fire, theft, or similar casualty, as constituting revocation of original will. 61 A.L.R.3d 958.

### COMMENT TO OFFICIAL TEXT

This section is designed to clarify the law by stating what is believed to be a fairly standard approach to questions concerning bur-

dens of going forward with evidence in will contest cases.

**15-3-408. Formal testacy proceedings — Will construction — Effect of final order in another jurisdiction.** — A final order of a court of another state determining testacy, or the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made. [I.C., § 15-3-408, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 916 et seq.

31 Am. Jur. 2d, Executors and Administrators, § 121.

**C.J.S.** — 95 C.J.S., Wills, § 516.

### COMMENT TO OFFICIAL TEXT

This section is designed to extend the effect of final orders of another jurisdiction of the United States. It should not be read to restrict the obligation of the local court to respect the judgment of another court when parties who were personally before the other court also are personally before the local court. An "authenticated copy" includes copies properly certified under the full faith and credit statute. If conflicting claims of domicile are made in proceedings which are commenced in different jurisdictions, Section 3-202 applies. This section is framed to apply where a formal proceeding elsewhere has been previously concluded. Hence, if a local proceeding is concluded before formal proceedings at domicile are concluded, local law will control.

Informal proceedings by which a will is probated or a personal representative is appointed are not proceedings which must be respected by a local court under either Section 3-202 or this section.

Nothing in this section bears on questions

of what assets are included in a decedent's estate.

This section adds nothing to existing law as applied to cases where the parties before the local court were also personally before the foreign court, or where the property involved was subject to the power of the foreign court. It extends present law so that, for some purposes, the law of another state may become binding in regard to due execution or revocation of wills controlling local land, and to questions concerning the meaning of ambiguous words in wills involving local land. But, choice of law rules frequently produce a similar result. See § 240 Restatement of the Law, Second: Conflict of Laws, p. 73, Proposed Official Draft III, 1969.

This section may be easier to justify than familiar choice of law rules, for its application is limited to instances where the protesting party has had notice of, and an opportunity to participate in, previous litigation resolving the question he now seeks to raise.

**15-3-409. Formal testacy proceedings — Order — Foreign will — Lost will.** — After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper and that the proceeding was com-

menced within the limitation prescribed by section 15-3-108 of this code, it shall determine the decedent's domicile at death, his heirs and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by section 15-3-612 of this code. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place. When a lost will is established, the provisions thereof must be found by the court and the findings filed and recorded as other wills are filed and recorded. [I.C., § 15-3-409, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

**Lost Wills.**

Contents of lost will can be proved only in two ways — first by a proven copy, second by someone who has read, or heard read, the original. Subscribing witness who never read, or heard read, the will cannot prove the will by reading a copy identified by a third person who wrote it, and then testifying that copy contained the contents of the will. Hull v. Cartin, 61 Idaho 578, 105 P.2d 196 (1940).

While an alleged carbon or duplicate copy of a lost will may be the best evidence of the contents of the will, that does not make such copy the “best evidence” or even admissible on examination of a witness as to the provisions of the will, unless such witness personally knows it is a carbon or duplicate copy of the alleged lost will. Hull v. Cartin, 61 Idaho 578, 105 P.2d 196 (1940).

The declarations of a testator after the due execution of a will may be admitted to show the will was lost or unavoidably destroyed or stolen against the wish of the testator during his lifetime, and such evidence may rebut the

legal presumption that a will has been destroyed *animo revocandi*. Hull v. Cartin, 61 Idaho 578, 105 P.2d 196 (1940).

Evidence consisting of a copy of the will, testimony of the attorney who drafted and typed the will, and testimony of witnesses who were informed by the testator as to part of the contents of the will were insufficient to prove a lost will. Hull v. Cartin, 61 Idaho 578, 105 P.2d 196 (1940).

In a proceeding to probate a lost will, a carbon copy of the will proven by the one witness thereto did not constitute original evidence or a duplicate original of the will where the copy was never executed by being signed and witnessed. Hull v. Cartin, 61 Idaho 578, 105 P.2d 196 (1940).

Failure to establish either execution or contents of alleged lost will precluded recovery in will contest based on revocation by a subsequent will allegedly lost. Swaringen v. Swanstrom, 67 Idaho 245, 175 P.2d 692 (1946).

RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 175.  
80 Am. Jur. 2d, Wills, § 934 et seq.



## COMMENT TO OFFICIAL TEXT

Model Probate Code section 80(a), slightly changed. If the court is not satisfied that the alleged decedent is dead, it may permit amendment of the proceeding so that it would

become a proceeding to protect the estate of a missing and therefore "disabled" person. See Article V [Chapter 5] of this Code.

**15-3-410. Formal testacy proceedings — Probate of more than one instrument.** — If two (2) or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one (1) instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one (1) instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of section 15-3-412 of this Part. [I.C., § 15-3-410, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, §§ 759, 769.

**C.J.S.** — 95 C.J.S., Wills, § 461 et seq.

**A.L.R.** — Probate where two or more testamentary documents, bearing the same date or undated, are proffered. 17 A.L.R.3d 603.

## COMMENT TO OFFICIAL TEXT

Except as otherwise provided in Section 3-412, an order in a formal testacy proceeding serves to end the time within which it is possible to probate after-discovered wills or to give effect to late-discovered facts concerning heirship. Determination of heirs is not barred by the three year limitation but a judicial determination of heirs is conclusive unless the order may be vacated.

This section authorizes a court to engage in some construction of wills incident to determining whether a will is entitled to probate. It seems desirable to leave the extent of this power to the sound discretion of the court. If wills are not construed in connection with a judicial probate, they may be subject to construction at any time. See Section 3-108.

**15-3-411. Formal testacy proceedings — Partial intestacy.** — If it becomes evident in the course of a formal testacy proceeding that though one (1) or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect. [I.C., § 15-3-411, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Wills, § 708 et seq.

**C.J.S.** — 95 C.J.S., Wills, § 862 et seq.

**15-3-412. Formal testacy proceedings — Effect of order — Vacation.** — Subject to appeal and subject to vacation as provided herein and in section 15-3-413 of this part, a formal testacy order under sections 15-3-409

through 15-3-411 of this part, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent’s estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication.

(2) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one (1) or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death or were given no notice of any proceeding concerning his estate, except by publication.

(3) A petition for vacation under either subsection (1) or (2) of this section must be filed prior to the earlier of the following time limits:

(a) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six (6) months after the filing of the closing statement.

(b) Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by section 15-3-108 of this code when it is no longer possible to initiate an original proceeding to probate a will of the decedent.

(c) Twelve (12) months after the entry of the order sought to be vacated.

(4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.

(5) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under subsection (2) of section 15-3-403 of this part was made.

If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances. [I.C., § 15-3-412, as added by 1971, ch. 111, § 1, p. 233; am. 2008, ch. 75, § 2, p. 201.]

STATUTORY NOTES

**Amendments.** — The 2008 amendment, internal reference updates.  
by ch. 75, redesignated subsections and made **Compiler’s Notes.** — The words “this

code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Laches.  
Petition.  
Setting aside decree.

#### **Laches.**

In will contest based on undue influence where contestant nine months later raised question of revocation for the first time, the question came too late to raise a new issue. *Swaringen v. Swanstrom*, 67 Idaho 245, 175 P.2d 692 (1946).

#### **Petition.**

To contest the probate or validity of a will, the person contesting must file a petition in writing containing the allegations against the

validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked. *Hagan v. Sullivan*, 24 Idaho 19, 132 P. 106 (1913).

#### **Setting Aside Decree.**

The laws providing for the setting aside of judgments or decrees on account of mistake, inadvertence, or excusable neglect apply to probate practice. *Luke v. Kettenbach*, 32 Idaho 191, 181 P. 705 (1919).

## RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 920 et seq.

**C.J.S.** — 95 C.J.S., Wills, § 741 et seq.

## COMMENT TO OFFICIAL TEXT

The provisions barring proof of late-discovered wills is derived in part from section 81 of Model Probate Code. The same section is the source of the provisions of (5) above. The provisions permitting vacation of an order determining heirs on certain conditions reflect the effort to offer parallel possibilities for adjudications in testate and intestate estates. See Section 3-401. An objective is to make it possible to handle an intestate estate exactly as a testate estate may be handled. If this is achieved, some of the pressure on persons to make wills may be relieved.

If an alleged decedent turns out to have been alive, heirs and distributees are liable to restore the "estate or its proceeds." If neither can be identified through the normal process of tracing assets, their liability depends upon the circumstances. The liability of distributees to claimants whose claims have not been barred, or to persons shown to be entitled to distribution when a formal proceeding changes a previous assumption informally established which guided an earlier distribution, is different. See Sections 3-909 and 3-1004.

**15-3-413. Formal testacy proceedings — Vacation of order for other cause.** — For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. [I.C., § 15-3-413, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 920 et seq.

**C.J.S.** — 95 C.J.S., Wills, § 741 et seq.



**15-3-414. Formal proceedings concerning appointment of personal representative.** — (a) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by section 15-3-402 of this Part, as well as by this section. In other cases, the petition shall contain or adopt the statements required by subsection (a) of section 15-3-301 of this code and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.

(b) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under section 15-3-203 of this code, make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under section 15-3-611 of this code. [I.C., § 15-3-414, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 157 et seq., 239 et seq.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 21 et seq.

### COMMENT TO OFFICIAL TEXT

A petition raising a controversy concerning the priority or qualifications of a personal representative may be combined with a petition in a formal testacy proceeding. However, it is not necessary to petition formally for the appointment of a personal representative as a part of a formal testacy proceeding. A personal representative may be appointed on informal application either before or after formal proceedings which establish whether the decedent died testate or intestate or no appointment may be desired. See Sections 3-107, 3-301(a)(3) [§ 15-3-301(c)] and 3-307. Furthermore, procedures for securing the appointment of a new personal representative

after a previous assumption as to testacy has been changed are provided by Section 3-612. These may be informal, or related to pending formal proceedings concerning testacy. A formal order relating to appointment may be desired when there is a dispute concerning priority or qualification to serve but no dispute concerning testacy. It is important to distinguish formal proceedings concerning appointment from “supervised administration.” The former includes any proceeding after notice involving a request for an appointment. The latter originates in a “formal proceeding” and may be requested in addition to a ruling concerning testacy or priority or

qualifications of a personal representative, but is descriptive of a special proceeding with a different scope and purpose than those concerned merely with establishing the bases for an administration. In other words, a personal representative appointed in a "formal" proceeding may or may not be "supervised."

Another point should be noted. The Court may not immediately issue letters even though a formal proceeding seeking appointment is involved and results in an order authorizing appointment. Rather, Section 3-601 et seq. control the subject of qualification. Section 1-305 deals with letters.

## PART 5. SUPERVISED ADMINISTRATION

### 15-3-501. Supervised administration — Nature of proceeding. —

Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in this Part, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised. [I.C., § 15-3-501, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

**Cited in:** In re Estate of Irwin, 99 Idaho 543, 585 P.2d 953 (1978); Spencer v. Idaho First Nat'l Bank, 106 Idaho 316, 678 P.2d 108

(Ct. App. 1984); Kunzler v. First Interstate Bank, 108 Idaho 374, 699 P.2d 1388 (1985).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 147, 372.

## COMMENT TO OFFICIAL TEXT

This and the following sections of this Part describe an optional procedure for settling an estate in one continuous proceeding in the Court. The proceeding is characterized as "in rem" to align it with the concepts described by the Model Probate Code. See Section 62, M.P.C. In cases where supervised administration is not requested or ordered, no compulsion other than self-interest exists to compel use of a formal testacy proceeding to secure an adjudication of a will or no will, because informal probate or appointment of an administrator in intestacy may be used. Similarly, unless administration is supervised, there is

no compulsion other than self-interest to use a formal closing proceeding. Thus, even though an estate administration may be begun by use of a *formal* testacy proceeding which may involve an order concerning who is to be appointed personal representative, the proceeding is over when the order concerning testacy and appointment is entered. See Section 3-107. Supervised administration, therefore, is appropriate when an interested person desires assurance that the essential steps regarding opening and closing of an estate will be adjudicated. See the Comment following the next section.

**15-3-502. Supervised administration — Petition — Order. —** A petition for supervised administration may be filed by any interested person or by a personal representative at any time or the prayer for supervised

administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied. After notice to interested persons, the court shall order supervised administration of a decedent's estate: (1) if the decedent's will directs supervised administration, it shall be ordered unless the court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration; (2) if the decedent's will directs unsupervised administration, supervised administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate; or (3) in other cases if the court finds that supervised administration is necessary under the circumstances. [I.C., § 15-3-502, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 243, 244.

#### COMMENT TO OFFICIAL TEXT

The expressed wishes of a testator regarding supervised administration should bear upon, but not control, the question of whether supervised administration will be ordered. This section is designed to achieve a fair balance between the wishes of the decedent, and the interests of successors in regard to supervised administration.

Since supervised administration normally will result in an adjudicated distribution of the estate, the issue of will or no will must be adjudicated. This section achieves this by forcing a petition for supervised administration to include matters necessary to put the issue of testacy before the Court. It is possible, however, that supervised administration will be requested because administrative complexities warranting it develop after the issue of will or no will has been resolved in a previously concluded formal testacy proceeding.

It should be noted that supervised administration, though it compels a judicial settle-

ment of an estate, is not the only route to obtaining judicial review and settlement at the close of an administration. The procedures described in Sections 3-1101 and 3-1102 are available for use by or against personal representatives who are not supervised. Also efficient remedies for breach of duty by a personal representative who is not supervised are available under Part 6 of this Article [Chapter]. Finally, each personal representative consents to jurisdiction of the Court as invoked by mailed notice of any proceeding relating to the estate which may be initiated by an interested person. Also, persons interested in the estate may be subjected to orders of the Court following mailed notices made in proceedings initiated by the personal representative. In combination, these possibilities mean that supervised administration will be valuable principally to persons who see some advantage in a single judicial proceeding which will produce adjudications on all major points involved in an estate settlement.

**15-3-503. Supervised administration — Effect on other proceedings.** — (a) The pendency of a proceeding for supervised administration of



a decedent's estate stays action on any informal application then pending or thereafter filed.

(b) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by section 15-3-401 of this code.

(c) After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition. [I.C., § 15-3-503, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 245.

### COMMENT TO OFFICIAL TEXT

The duties and powers of personal representative are described in Part 7 of this Article [Chapter]. The ability of a personal representative to create a good title in a purchaser of estate assets is not hampered by the fact that the personal representative may breach a duty created by statute, court order or other circumstances in making the sale. See Section 3-715. However, formal proceedings against a personal representative may involve requests for qualification of the power normally possessed by personal representatives which, if granted, would subject the personal representative to the penalties for contempt of Court if he disregarded the restriction. See Section 3-607. If a proceeding also involved a demand that particular real estate be kept in the estate pending determination of a petitioner's

claim thereto, notice of the pendency of the proceeding could be recorded as is usual under the jurisdiction's system for the lis pendens concept.

The word "restricts" in the last sentence is intended to negate the idea that a judicial order specially qualifying the powers and duties of a personal representative is a restraining order in the usual sense. The section means simply that some supervised personal representatives may receive the same powers and duties as ordinary personal representatives, except that they must obtain a Court order before paying claimants or distributing, while others may receive a more restricted set of powers. Section 3-607 governs petitions which seek to limit the power of a personal representative.

**15-3-504. Supervised administration — Powers of personal representative.** — Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this code, but he shall not exercise his power to make any distribution of the estate without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be indorsed on his letters of appointment and, unless so indorsed, is ineffective as to persons dealing in good faith with the personal representative. [I.C., § 15-3-504, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler’s Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

JUDICIAL DECISIONS

**Restriction.**  
A restriction on the power of the personal representative may be ordered by the probate court, if endorsed on the letters of administration. If the restriction is not endorsed on

the letters of appointment, it is ineffective as to the persons dealing in good faith with the personal representative. *AgAmerica v. Westgate*, 129 Idaho 621, 931 P.2d 1 (Ct. App. 1997).

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 372 et seq.

COMMENT TO OFFICIAL TEXT

This section provides authority to issue letters showing restrictions of power of supervised administrators. In general, persons dealing with personal representatives are not bound to inquire concerning the authority of a personal representative, and are not affected by provisions in a will or judicial order unless they know of it. But, it is expected that

persons dealing with personal representatives will want to see the personal representative’s letters, and this section has the practical effect of requiring them to do so. No provision is made for noting restrictions in letters except in the case of supervised representatives. See Section 3-715.

**15-3-505. Supervised administration — Interim orders — Distribution and closing orders.** — Unless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices and contents of orders prescribed for proceedings under section 15-3-1001 of this code. Interim orders approving or directing partial distributions or granting other relief may be issued by the court at any time during the pendency of a supervised administration on the application of the personal representative or any interested person. [I.C., § 15-3-505, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler’s Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 373, 913, 981.

COMMENT TO OFFICIAL TEXT

Since supervised administration is a single proceeding, the notice requirement contained in 3-106 relates to the notice of institution of

the proceedings which is described with particularity by Section 3-502. The above section makes it clear that an additional notice is

required for a closing order. It was discussed whether provision for notice of interim orders should be included. It was decided to leave the point to be covered by court order or rule. There was a suggestion for a rule as follows: "Unless otherwise required by order, notice of interim orders in supervised administration need be given only to interested persons who

request notice of all orders entered in the proceeding." 1-402 permits any person to waive notice by a writing filed in the proceeding.

A demand for notice under Section 3-204 would entitle any interested person to notice of any interim order which might be made in the course of supervised administration.

## PART 6. PERSONAL REPRESENTATIVE — APPOINTMENT, CONTROL AND TERMINATION OF AUTHORITY

**15-3-601. Qualification.** — Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office. In his statement of acceptance, the personal representative shall subscribe an oath to the effect that he will perform the duties of his office according to the law. [I.C., § 15-3-601, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Time of accrual of powers and duties, § 15-3-701.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### Effect of Failure to Take Oath.

Administrator who fails to take the oath and file the bond required by law, but nevertheless administers the estate, is administra-

tor de facto, and may close up the estate if no objection is made, and is liable for his acts as administrator. *Harris v. Coates*, 8 Idaho 491, 69 P. 475 (1902).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 261, 262, 312 et seq.

**C.J.S.** — 33 C.J.S., Executors and Administrators, §§ 35 et seq., 88 et seq.

### COMMENT TO OFFICIAL TEXT

This and related sections of this Part describe details and conditions of appointment which apply to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is super-

vised. Section 1-305 authorizes issuance of copies of letters and prescribes their content. The section should be read with Section 3-504 which directs endorsement on letters of any restrictions of power of a supervised administrator.

#### **15-3-602. Acceptance of appointment — Consent to jurisdiction.**

— By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative, or mailed to him by ordinary first class mail at his address as listed in the application or petition for appointment or as thereafter reported to the court and to his address as



then known to the petitioner. [I.C., § 15-3-602, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 262, 1227.      **C.J.S.** — 33 C.J.S., Executors and Administrators, §§ 35 et seq., 88 et seq.

COMMENT TO OFFICIAL TEXT

Except for personal representatives appointed pursuant to Section 3-502, appointees are not deemed to be “officers” of the appointing court or to be parties in one continuous judicial proceeding that extends until final settlement. See Section 3-107. Yet, it is desirable to continue present patterns which prevent a personal representative who might make himself unavailable to service within the state from affecting the power of the appointing court to enter valid orders affecting him. See *Michigan Trust Co. v. Ferry*, 33 S.

Ct. 550, 228 U.S. 346, 57 L. Ed. 867 (1912). The concept employed to accomplish this is that of requiring each appointee to consent in advance to the personal jurisdiction of the Court in any proceeding relating to the estate that may be instituted against him. The section requires that he be given notice of any such proceeding, which, when considered in the light of the responsibility he has undertaken, should make the procedure sufficient to meet the requirements of due process.

**15-3-603. Bond not required without court order — Exceptions.**  
— No bond is required of a personal representative appointed in informal proceedings, except (1) upon the appointment of a special administrator; (2) when an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond or (3) when bond is required under section 15-3-605 of this chapter. Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested party and the court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties. No bond will be required of any domestic bank or trust company. [I.C., § 15-3-603, as added by 1971, ch. 111, p. 233.]

COMMENT TO OFFICIAL TEXT

This section must be read with the next three sections. The purpose of these provisions is to move away from the idea that bond always should be required of a probate fiduciary, or required unless a will excuses it. Also, it is designed to keep the registrar acting pursuant to applications in informal proceedings, from passing judgment in each case on the need for bond. The point is that the court and registrar are not responsible for seeing that personal representatives perform as they are supposed to perform. Rather, performance is coerced by the remedies avail-

able to interested persons. Interested persons are protected by their ability to demand prior notice of informal proceedings (Section 3-204), to contest a requested appointment by use of a formal testacy proceeding or by use of a formal proceeding seeking the appointment of another person. Section 3-105 gives general authority to the court in a formal proceeding to make appropriate orders as desirable incident to estate administration. This should be sufficient to make it clear that an informal application may be blocked by a formal petition which disputes the matters stated in the

petition. Furthermore, an interested person has the remedies provided in Sections 3-605 and 3-607. Finally, interested persons have assurance under this Code that their rights in respect to the values of a decedent's estate cannot be terminated without a judicial order after notice or before the passage of three years from the decedent's death.

It is believed that the total package of protection thus afforded may represent more real protection than a blanket requirement of bond. Surely, it permits a reduction in the procedure which must occur in uncomplicated estates where interested persons are perfectly willing to trust each other and the fiduciary.

#### **15-3-604. Bond amount — Security — Procedure — Reduction. —**

If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the registrar indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond with the registrar, or give other suitable security, in an amount not less than the estimate. The registrar shall determine that the bond is duly executed by a corporate surety, or one (1) or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property or other adequate security. The registrar may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in section 15-6-101 of this code) in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties. [I.C., § 15-3-604, as added by 1971, ch. 111, § 1, p. 233.]

### **STATUTORY NOTES**

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

The words enclosed in parentheses so appear in the law as enacted.

### **JUDICIAL DECISIONS**

#### **DECISIONS UNDER PRIOR LAW**

##### **ANALYSIS**

Effect of judgment or decree.  
Notice to surety.

#### **Effect of Judgment or Decree.**

The decree of distribution in the probate court fixing the amount of money to be distributed and the court's order passing upon and approving the final account of the executor, in the absence of fraud or collusion between the legatees and the executor, are binding upon the executor and his sureties although the sureties were not parties to the proceeding. *Knowles v. Kasiska*, 46 Idaho 379, 268 P. 3 (1928).

A judgment or decree against an executor or administrator is conclusive against the sureties on his bond and they cannot collaterally question the judgment rendered against their principals. *Knowles v. Kasiska*, 46 Idaho 379, 268 P. 3 (1928).

#### **Notice to Surety.**

A surety on a guardian's bond is chargeable with notice of every proceeding affecting the guardian's liability, and the guardian's ap-

pearance in court was the surety's appearance; hence, the surety could not contend that it had not had its day in court or that it had

been deprived of property without due process of law. *Short v. Thompson*, 56 Idaho 361, 55 P.2d 163 (1936).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 312 et seq., 355-358.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 91 et seq.

### COMMENT TO OFFICIAL TEXT ~

This section permits estimates of value needed to fix the amount of required bond to be filed when it becomes necessary. A consequence of this procedure is that estimates of value of estates no longer need appear in the petitions and applications which will attend

every administered estate. Hence, a measure of privacy that is not possible under most existing procedures may be achieved. A co-signature arrangement might constitute adequate security within the meaning of this section.

**15-3-605. Demand for bond by interested person.** — Any person apparently having an interest in the estate worth in excess of one thousand dollars (\$1,000), or any creditor having a claim in excess of one thousand dollars (\$1,000), may make a written demand that a personal representative give bond. The demand must be filed with the clerk of the court and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in section 15-3-603 or 15-3-604 of this Part. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within thirty (30) days after receipt of notice is cause for his removal and appointment of a successor personal representative. [I.C., § 15-3-605, as added by 1971, ch. 111, § 1, p. 233; am. 1974, ch. 199, § 2, p. 1516.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 312 et seq.

### COMMENT TO OFFICIAL TEXT

The demand for bond described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appointed. The mechanism for compelling bond is designed to function without unnecessary judicial involvement. If demand for bond is made in a formal proceeding, the judge can determine the amount of bond to be required with due

consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided by statute so that the demand can be complied with without resort to judicial proceedings. The information which a personal representative is required by Section 3-705 to give each beneficiary includes a statement concerning whether bond has been required.

**15-3-606. Terms and conditions of bonds.** — (a) The following requirements and provisions apply to any bond required by this Part:



(1) Bonds shall name the state of Idaho as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law.

(2) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.

(3) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(4) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the court may be initiated against a surety for breach of the obligation of the bond of the personal representative.

(5) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation. [I.C., § 15-3-606, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 312 et seq.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 91 et seq.

**A.L.R.** — Liability of executor or administrator, or his bond, for loss caused to estate by acts or default of agent or attorney employed by him. 28 A.L.R.3d 1191.

#### COMMENT TO OFFICIAL TEXT

Paragraph (2) is based, in part, on Section 109 of the Model Probate Code. Paragraph (3) is derived from Section 118 of the Model Probate Code.

**15-3-607. Order restraining personal representative.** — (a) On petition of any person who appears to have an interest in the estate, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement, or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

(b) The matter shall be set for hearing within ten (10) days unless the parties otherwise agree. Notice as the court directs shall be given to the

personal representative and his attorney of record, if any, and to any other parties named defendant in the petition.

(c) If any person is suspected of having concealed, embezzled, or smuggled, laid away or disposed of any moneys, goods, or chattels of the decedent or to have in his possession or subject to his knowledge, any deeds, conveyances, bonds, contracts, or other writings, or any personal estate, or any other claim or demand or any last will of the decedent, such person may be ordered to appear, examined on oath and held to account upon such matters. [I.C., § 15-3-607, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 300, 371.

### COMMENT TO OFFICIAL TEXT

Cf. Section 3-401 which provides for a restraining order against a previously appointed personal representative incident to a formal testacy proceeding. The above section describes a remedy which is available for any cause against a previously appointed personal representative, whether appointed formally or informally.

This remedy, in combination with the safeguards relating to the process for appointment of a personal representative, permit

“control” of a personal representative that is believed to be equal, if not superior to, that presently available with respect to “supervised” personal representatives appointed by inferior courts. The request for a restraining order may mark the beginning of a new proceeding but the personal representative, by the consent provided in Section 3-602, is practically in the position of one who, on motion, may be cited to appear before a judge.

**15-3-608. Termination of appointment — General.** — Termination of appointment of a personal representative occurs as indicated in sections 15-3-609 through 15-3-612, inclusive, of this Part. Termination ends the right and power pertaining to the office of personal representative as conferred by this code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding. [I.C., § 15-3-608, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

## JUDICIAL DECISIONS

## DECISIONS UNDER PRIOR LAW

**Liability.**

An executor under a will which was subsequently declared invalid, and who, as such executor, was in possession of the estate pre-

mises, was not liable for rent for the period of his occupancy. In *re Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 269 et seq.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 112 et seq.

## COMMENT TO OFFICIAL TEXT

"Termination," as defined by this and succeeding provisions, provides definiteness respecting when the powers of a personal representative (who may or may not be discharged by court order) terminate.

It is to be noted that this section does not relate to jurisdiction over the estate in proceedings which may have been commenced against the personal representative prior to

termination. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

It is important to note that "termination" is not "discharge." However, an order of the Court entered under 3-1001 or 3-1002 both terminates the appointment of, and discharges, a personal representative.

**15-3-609. Termination of appointment — Death or disability. —**

The death of a personal representative or the appointment of a conservator for the estate of a personal representative, terminates his appointment. Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates, has the power to perform acts necessary for protection and shall account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification. [I.C., § 15-3-609, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 274, 277, 283, 310.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 118.

## COMMENT TO OFFICIAL TEXT

See Section 3-718, which establishes the rule that a surviving co-executor may exercise all powers incident to the office unless the will provides otherwise. Read together, this sec-

tion and Section 3-718 mean that the representative of a deceased co-representative would not have any duty or authority in relation to the office held by his decedent.

**15-3-610. Termination of appointment — Voluntary. —** (a) An appointment of a personal representative terminates as provided in section 15-3-1003 of this code, one (1) year after the filing of a closing statement.



(b) An order closing an estate as provided in section 15-3-1001 or 15-3-1002 of this code terminates an appointment of a personal representative.

(c) A personal representative may resign his position by filing a written statement of resignation with the registrar after he has given at least fifteen (15) days' written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him. [I.C., § 15-3-610, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

**Final Report.** Where administrator tenders his resignation and makes his final report, order of judge approving report and discharging him as administrator and appointing his successor approves of all that is contained in such final report. *Miller v. Lewiston Nat'l Bank*, 18 Idaho 124, 108 P. 901 (1910).

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 306 et seq. **C.J.S.** — 33 C.J.S., Executors and Administrators, § 112 et seq.

COMMENT TO OFFICIAL TEXT

Subparagraph (c) above provides a procedure for resignation by a personal representative which may occur without judicial assistance.

**15-3-611. Termination of appointment by removal — Cause — Procedure.** — (a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in section 15-3-607 of this Part, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

(b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the

proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets. [I.C., § 15-3-611, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### **Removal of Personal Representative.**

Where substantial, competent evidence in the record supported the finding that the personal representative failed to act in the best interests of the estate, mismanaged the affairs of the estate, operated under a conflict of interest, failed to marshal estate assets and breached the fiduciary duty owed to the es-

tate, and where evidence demonstrated that this mismanagement was not merely a mistake, but was, in fact, fraudulent and willful, the magistrate did not err in removing the personal representative from that position. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 275 et seq.

**C.J.S.** — 33 C.J.S., Executors and Administrators, §§ 122, 123 et seq.

**A.L.R.** — Delay of executor or administra-

tor in filing inventory, account, or other report, or in completing administration and distribution of estate, as ground for removal. 33 A.L.R.4th 708.

### COMMENT TO OFFICIAL TEXT

Thought was given to qualifying (a) above so that no formal removal proceedings could be commenced until after a set period from entry of any previous order reflecting judicial

consideration of the qualifications of the personal representative. It was decided, however, that the matter should be left to the judgment of interested persons and the Court.

**15-3-612. Termination of appointment — Change of testacy status.** — Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although his powers may be reduced as provided in section 15-3-401 of this code. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within thirty (30) days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be. [I.C., § 15-3-612, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 258 et seq.      **C.J.S.** — 33 C.J.S., Executors and Administrators, § 123 et seq.

COMMENT TO OFFICIAL TEXT

This section and Section 3-401 describe the relationship between formal or informal proceedings which change a previous assumption concerning the testacy of the decedent, and a previously appointed personal representative. The basic assumption of both sections is that an appointment, with attendant powers of management, is separable from the basis of appointment; i.e., intestate or testate?; what will is the last will? Hence, a previously appointed personal representative continues to serve in spite of formal or informal proceedings that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of the person who would be entitled to serve if his assumption concerning the de-

cedent's will prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent's will. It is not necessary for the continuing representative to seek reappointment under the new assumption for Section 3-703 is broad enough to require him to administer the estate as intestate, or under a later probated will, if either status is established after he was appointed. Under Section 3-403, notice of a formal testacy proceeding is required to be given to any previously appointed personal representative. Hence, the testacy status cannot be changed without notice to a previously appointed personal representative.

**15-3-613. Successor personal representative.** — Parts 3 and 4 of this chapter govern proceedings for appointment of a personal representative to succeed one (1) whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated. [I.C., § 15-3-613, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Cross References.** — Powers of personal representative, § 15-3-711.

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1014 et seq.      **C.J.S.** — 34 C.J.S., Executors and Administrators, § 1129 et seq.



**15-3-614. Special administrator — Appointment.** — A special administrator may be appointed:

(a) Informally by the registrar on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in section 15-3-609 of this Part;

(b) In a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice. [I.C., § 15-3-614, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Appointment not favored.  
Priority of public administrator.

#### Appointment Not Favored.

It is the policy of the law to keep the administration of the decedent's estates in the hands of regularly appointed administrators, and to rely on special ones only in cases of emergency, and for a limited time. *Vaught v. Struble*, 65 Idaho 26, 139 P.2d 456 (1943).

#### Priority of Public Administrator.

A public administrator who appeared before the probate court within a reasonable time and claimed the issuance of letters to him was entitled to priority in appointment over a special administrator. *Vaught v. Struble*, 63 Idaho 352, 120 P.2d 259 (1941).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1037 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1154 et seq.

## COMMENT TO OFFICIAL TEXT

The appointment of a special administrator other than one appointed pending original appointment of a general personal representative must be handled by the Court. Appointment of a special administrator would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of

conflict of interest. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem may be handled without judicial intervention by use of the delegation powers granted to personal representatives by Section 3-715(21).

### **15-3-615. Special administrator — Who may be appointed. —**

(a) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available, and qualified.

(b) In other cases, any proper person may be appointed special administrator. [I.C., § 15-3-615, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1040.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1154 et seq.

COMMENT TO OFFICIAL TEXT

In some areas of the country, particularly where wills cannot be probated without full notice and hearing, appointment of special administrators pending probate is sought almost routinely. The provisions of this Code concerning informal probate should reduce the number of cases in which a fiduciary will need to be appointed pending probate of a will. Nonetheless, there will be instances where contests begin before probate and where it may be necessary to appoint a special

administrator. The objective of this section is to reduce the likelihood that contestants will be encouraged to file contests as early as possible simply to gain some advantage via having a person who is sympathetic to their cause appointed special administrator. Most will contests are not successful. Hence, it seems reasonable to prefer the named executor as special administrator where he is otherwise qualified.

**15-3-616. Special administrator — Appointed informally — Powers and duties.** — A special administrator appointed by the registrar in informal proceedings pursuant to subsection (a) of section 15-3-614 of this Part has the duty to collect and manage the assets of the estate, to preserve them, to account therefor and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under this code necessary to perform his duties. [I.C., § 15-3-616, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1037 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1154 et seq.

**15-3-617. Special administrator — Formal proceedings — Powers and duties.** — A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts or on other terms as the court may direct. [I.C., § 15-3-617, as added by 1971, ch. 111, § 1, p. 233.]

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

**Powers.**

The powers of a special administrator of a decedent's estate are limited to those granted

to him by the statute, and it cannot be concluded that the court intended to, or would, grant him powers not authorized by the stat-

utes in the granting of special letters of administration. *Vaught v. Struble*, 65 Idaho 26, 139 P.2d 456 (1943).

Where a special administrator surrendered to warehouse a certificate evidencing decedent's deposit of wheat therein and received therefor the market value of the wheat at the time of the transaction, less the amount owed

to the warehouse by decedent for storage, and accounted for the sum received, and made no private or personal gain by the transaction, and the estate lost no money because of it, the transaction should be approved by the court, though the certificate might have become more valuable at a later time. *Vaught v. Struble*, 65 Idaho 26, 139 P.2d 456 (1943).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1037 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1167 et seq.

#### **15-3-618. Termination of appointment — Special administrator.**

— The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in sections 15-3-608 through 15-3-611 of this Part. [I.C., § 15-3-618, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### **Termination of Powers.**

When general letters of administration are granted, a special administrator's term and authority ceases. *Vaught v. Struble*, 65 Idaho 26, 139 P.2d 456 (1943).

The authority of a special administrator, who appeals from an order granting general

letters of administration to another, does not continue pending termination of such appeal, and he retains no authority except to account for and to pay over and deliver the property in his hands to the general administrator. *Vaught v. Struble*, 65 Idaho 26, 139 P.2d 456 (1943).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1056.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 1158, 1159.

## PART 7. DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

**15-3-701. Time of accrual of duties and powers.** — Duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative. [I.C., § 15-3-701, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 359 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 212 et seq., 221 et seq.



**A.L.R.** — Relation back of letters testamentary or of administration as validating prior sales of decedent's property. 2 A.L.R.3d 1105.

COMMENT TO OFFICIAL TEXT

This section codifies the doctrine that the authority of a personal representative relates back to death from the [moment] it arises. It also makes it clear that authority of a personal representative stems from his appointment. The sentence concerning ratification is

designed to eliminate technical questions that might arise concerning the validity of acts done by others prior to appointment. Section 3-715(21) relates to delegation of authority after appointment.

**15-3-702. Priority among different letters.** — A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment. [I.C., § 15-3-702, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 62.

COMMENT TO OFFICIAL TEXT

The qualification relating to "modification" of an appointment is intended to refer to the change that may occur in respect to the exclusive authority of one with letters upon later appointment of a co-representative or of a special administrator. The sentence concerning erroneous dual appointment is derived from recent New York legislation. See Section 704, Surrogate's Court Procedure Act [McKinney's SCPA 704].

Erroneous appointment of a second personal representative is possible if formal pro-

ceedings after notice are employed. It might be desirable for a state to promulgate a system whereby a notation of letters issued by each county probate office would be relayed to a central record keeping office which, in turn, could indicate to any other office whether letters for a particular decedent, perhaps identified by social security number, had been issued previously. The problem can arise even though notice to known interested persons and by publication is involved.

**15-3-703. General duties — Relation and liability to persons interested in estate — Standing to sue.** — (a) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by section 15-7-302 of this code. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

(b) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated

will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent as described elsewhere in this code.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death. [I.C., § 15-3-703, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

### JUDICIAL DECISIONS

#### ANALYSIS

Fiduciary duty.  
Solicitation of bids.

#### **Fiduciary Duty.**

An executrix, with a life estate in community property, owed a fiduciary duty to the holders of remainder interests and has an obligation not to pay more taxes out of those interests than is due. *West v. Tax Comm'n*, 99 Idaho 26, 576 P.2d 1060 (1978).

#### **Solicitation of Bids.**

Where an administrator, deeming himself in a somewhat precarious position due to the disparity between the several appraisements and offers, petitioned the magistrate for a resolution of the question how best to dispose

of the property, and the magistrate's resolution of the question was that disposition of the property could best be effected by another solicitation of sealed bids, and order the administrator to do so, but where the order did not, however, require confirmation by the court for completion of the sale, the contemplated disposition, then, was not a judicial sale by the court through the administrator as agent for the court, but rather the solicitation of bids and acceptance of a bid by the administrator. *Mediterranean Homes, Inc. v. Carnes*, 101 Idaho 70, 608 P.2d 873 (1980).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Executors continuing as trustees.  
Fiduciary relationship.  
Liability.  
Powers.  
Suits against.

### Executors Continuing as Trustees.

In a will appointing trustees, where the same persons are the executors, the duties as executors continue until the estate is settled or distributed; and as to part of the estate not distributed, the executors cannot assume the duties of trustees. *Jones v. Broadbent*, 21 Idaho 555, 123 P. 476 (1912).

### Fiduciary Relationship.

An executor or administrator has a trust of the most sacred character and should be held to the duty of performing his trust with the utmost fidelity. *Schneeberger v. Frazer*, 36 Idaho 737, 213 P. 568 (1923).

Executors and administrators occupy fiduciary relations toward the estate to which the utmost fidelity is owed. In *re Fleshman's Estate*, 51 Idaho 312, 5 P.2d 727 (1931).

### Liability.

Executrices, in possession of estate premises under a will subsequently declared invalid, are not liable for rent for the period of their occupancy. In *re Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

Executors or administrators must be appointed to care for the property of an estate, and, whether the appointment is legal or illegal, such person is equally liable for the care of the estate and is entitled to his lawful expenses and disbursements in connection therewith. In *re Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

### Powers.

Although an administrator owns no part of an estate he is the trustee thereof in the broadest sense; the administrator represents the legal title of the deceased; and while the administrator is functioning, no heir or other person interested in the estate may sue to enforce a claim in the estate's favor. *State Ins. Fund v. Hunt*, 52 Idaho 639, 17 P.2d 354 (1932).

Even though an executrix failed to perform a statutory duty of distributing realty to heirs or devisees, she retained all the powers and duties of executrix provided by law so long as she remained executrix. *Walker Bank & Trust Co. v. Steely*, 54 Idaho 591, 34 P.2d 56 (1934).

The administrator or executor of an estate of a deceased is the official and legal representative and trustee of the heirs and creditors of the estate, and it is his duty to protect, collect, and conserve the estate. *Uyeda v. Diefendorf*, 54 Idaho 614, 34 P.2d 65 (1934); *Wiesenthal v. Goff*, 63 Idaho 342, 120 P.2d 248 (1941).

Where an employee's death occurred after he sustained compensable injury from causes other than the compensable accident, award made under special schedule for fixed definite loss, although determined after employee's death, was recoverable by the administrator, since the right to the award was fixed at the time of the accident. *Mahoney v. Payette*, 64 Idaho 443, 133 P.2d 927 (1943).

### Suits Against.

Ordinarily, where a creditor or other person files an action that should be filed by administrator or executor, such action must be brought in the name of the administrator or executor, so when an executor or an administrator sets up an adverse claim to property alleged by a creditor to belong to the estate, such creditor even though his claim has been rejected by the administrator or executor, may sue such administrator or executor to determine the title to the disputed property in an action to recover the debt of such alleged creditor. *Simonton v. Simonton*, 33 Idaho 255, 193 P. 386 (1920).

An executor may be sued by a second administrator for an accounting and is responsible for property coming into his possession and also for property which he should have taken into his possession. *Felton v. Anderton*, 67 Idaho 160, 174 P.2d 212 (1946).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 219, 1118 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 621 et seq., 847 et seq.

**A.L.R.** — Who may exercise voting power of corporate stock pending settlement of estate of deceased owner. 7 A.L.R.3d 629.

Duty and liability of executor with respect to locating and noticing legatees, devisees, or

heirs. 10 A.L.R.3d 547.

Executor's or administrator's right to appeal from order granting or denying distribution. 16 A.L.R.3d 1274.

Right of executor or administrator to appeal from order of distribution. 16 A.L.R.3d 1274.

Right to partial distribution of estate or distribution of particular assets, prior to final closing. 18 A.L.R.3d 1173.

## COMMENT TO OFFICIAL TEXT

This and the next section are especially important sections for they state the basic

theory underlying the duties and powers of personal representatives. Whether or not a



personal representative is supervised, this section applies to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the court is created. See Section 3-501.

The fundamental responsibility is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the Court. But, the Code also makes it clear that the personal representative, in spite of the source of his authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. See Sections 3-107 and 3-704. Subsection (b) is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time." Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in no-notice

proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. See Section 3-302 concerning the status of a will probated without notice and Section 3-102 concerning the ineffectiveness of an unprobated will. However, it does *not* follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed. See Sections 3-909 and 3-1004. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter section.

Paragraph (c) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of Article IV [Chapter 4], are designed to eliminate many of the present reasons for ancillary administrations.

**15-3-704. Personal representative to proceed without court order — Exception.** — A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration. [I.C., § 15-3-704, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

#### JUDICIAL DECISIONS

##### ANALYSIS

Invocation of court's jurisdiction.  
Solicitation of bids.

##### Invocation of Court's Jurisdiction.

Where an administrator elected to invoke the court's jurisdiction to resolve the question whether, in the best interests of the estate, one of two bids should be accepted or new bids solicited, the administrator essentially waived his power to accept either bid by petitioning the court for an order therefor. *Mediterranean Homes, Inc. v. Carnes*, 101 Idaho 70, 608 P.2d 873 (1980).

##### Solicitation of Bids.

Where an administrator, deeming himself in a somewhat precarious position due to the disparity between the several appraisements and offers, petitioned the magistrate for a resolution of the question how best to dispose of the property, and the magistrate's resolution of the question was that disposition of the property could best be effected by another solicitation of sealed bids, and order the ad-

ministrator to do so, but where the order did not, however, require confirmation by the court for completion of the sale, the contemplated disposition, then, was not a judicial sale by the court through the administrator

as agent for the court, but rather the solicitation of bids and acceptance of a bid by the administrator. *Mediterranean Homes, Inc. v. Carnes*, 101 Idaho 70, 608 P.2d 873 (1980).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 370.

### COMMENT TO OFFICIAL TEXT

This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question relating to administration. Section 3-105 grants broad subject matter jurisdiction to the probate court which covers

a proceeding initiated for any purpose other than those covered by more explicit provisions dealing with testacy proceedings, proceedings for supervised administration, proceedings concerning disputed claims and proceedings to close estates.

**15-3-705. Duty of personal representative — Information to heirs and devisees.** — Not later than thirty (30) days after his appointment every personal representative, except any special administrator, shall give information of his appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information shall include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, indicate whether bond has been filed, and describe the court where papers relating to the estate are on file. The personal representative's failure to give this information is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary first class mail. [I.C., § 15-3-705, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### **Notice in Informal Proceeding.**

Where a person applies to probate court for informal appointment as a personal representative, the process initiated pursuant to § 15-3-301 is ex parte in that no notice of the application is generally required, and, where the estate letter is issued to the personal representative, the requirement of § 15-3-

303A that notice be given to the heirs and devisees does not apply; however, since the partial exclusion of notice in § 15-3-303A is due to a related notice requirement in this section, applicable upon appointment, notice still was required under this section. *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

## COMMENT TO OFFICIAL TEXT

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. Also, it requires the personal representative to give notice to persons who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed. The communication involved is not to be confused with the notice requirements relating to litigation. The duty applies even though there may have been a prior testacy proceeding after notice, except that persons who have been adjudicated to be without interest in the estate are excluded. The rights, if any, of persons in regard to estates cannot be cut off completely except by the running of the three year statute of limitations provided in Section 3-108, or by a formal judicial proceeding which will include full notice to all interested persons. The interests of some persons may be shifted from rights to specific property of the decedent to the proceeds from sale thereof, or to rights to values

received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in relation to trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may be interested in the estate, under Section 3-401 or, in connection with a formal closing, as provided by Section 3-1001.

No information or notice is required by this section if no personal representative is appointed.

In any circumstance in which a fiduciary accounting is to be prepared, preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account. *See* ALIABA Monograph, Whitman, Brown and Kramer, *Fiduciary Accounting Guide* (2nd edition 1990).

**15-3-706. Duty of personal representative — Inventory and appraisal.** — Within three (3) months after his appointment, a personal representative, except for a special administrator or a successor to another representative who has previously discharged this duty, shall prepare an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.

The personal representative shall send a copy of the inventory to interested persons who request it, and he may file the original of the inventory with the court. [I.C., § 15-3-706, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. 1973, ch. 167, § 10, p. 319; am. 2004, ch. 55, § 2, p. 253.]

## JUDICIAL DECISIONS

## DECISIONS UNDER PRIOR LAW

**Inventory.**

Where the testator sold certain machinery that had theretofore been represented in his will, but which he subsequently transferred to his executor in the liquidation of a debt due

from the testator to the executor, such machinery was properly omitted from the inventory of the testator's estate. *Hubbard v. Ball*, 59 Idaho 78, 81 P.2d 73 (1938).

## RESEARCH REFERENCES

**Am. Jur.** — 34 Am. Jur. 2d, *Executors and Administrators*, § 488 et seq.

**C.J.S.** — 33 C.J.S., *Executors and Administrators*, § 197 et seq.



**A.L.R.** — Delay of executor or administrator in filing inventory, account, or other report, or in completing administration and

distribution of estate, as ground for removal. 33 A.L.R.4th 708.

### COMMENT TO OFFICIAL TEXT

This and the following sections eliminate the practice now required by many probate statutes under which the judge is involved in the selection of appraisers. If the personal representative breaches his duty concerning the inventory, he may be removed. Section 3-611. Or, an interested person seeking to surcharge a personal representative for losses incurred as a result of his administration might be able to take advantage of any breach of duty concerning inventory. The section provides two ways in which a personal representative may handle an inventory. If the personal representative elects to send copies to all interested persons who request it, information concerning the assets of the estate need not become a part of the records of the probate court. The alternative procedure is to file the inventory with the court. This procedure would be indicated in estates with large numbers of interested persons, where the

burden of sending copies to all would be substantial. The Court's role in respect to the second alternative is simply to receive and file the inventory with the file relating to the estate. See 3-204, which permits any interested person to demand notice of any document relating to an estate which may be filed with the Court.

In 1975, the Joint Editorial Board recommended elimination of the word "or" that separated the language dealing with the duty to send a copy of the inventory to interested persons requesting it, from the final part of the paragraph dealing with filing of the original. [See S.L. 2004, ch. 55, § 2.] The purpose of the change was to prevent a literal interpretation of the original text that would have permitted a personal representative who filed the original inventory with the Court to avoid compliance with requests for copies from interested persons.

**15-3-707. Employment of appraisers.** — The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised. [I.C., § 15-3-707, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 34 Am. Jur. 2d, Executors and Administrators, § 495.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 202.

**15-3-708. Duty of personal representative — Supplementary inventory.** — If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisal showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed, or send copies thereof to the state tax commission and to all interested persons to whom copies of the original inventory were sent pursuant to section 15-3-706, Idaho Code. [I.C., § 15-3-708, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 11, p. 319.]

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 496.

**15-3-709. Duty of personal representative — Possession of estate.**

— Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto. [I.C., § 15-3-709, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Foreign personal representatives may bring suits, § 15-4-205.

## JUDICIAL DECISIONS

## ANALYSIS

De facto distribution.  
Transfer of assets.

**De Facto Distribution.**

The personal representative exercises control over the property of the estate, in a fiduciary capacity, until the close of administration of the estate. Therefore, for purposes of will provision that personal representative would not take under will if she died prior to distribution, neither the act of controlling the estate property in her fiduciary capacity as personal representative nor the act of possessing the estate property as the beneficiary presumptively entitled thereto was sufficient to constitute de facto distribution of the es-

tate. *Allen v. Shea*, 105 Idaho 31, 665 P.2d 1041 (1983).

**Transfer of Assets.**

Preliminary transfers to legatee, made before the statutory period for the presentation of creditors' claims and before estate taxes had been paid, were permissible; however, the assets were subject to recoupment by the personal representatives if required in order to satisfy estate liabilities. *Hintze v. Black*, 125 Idaho 655, 873 P.2d 909 (Ct. App. 1994).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Homestead entry.  
Possession of property of decedent.  
Workmen's compensation award.

**Homestead Entry.**

Where heirs make final proof on homestead entered by decedent, and title is conveyed to the heirs of the decedent, title vests directly in the legal heirs and does not inure to the benefit of the estate, and the court has no jurisdiction over such property. *Council Imp. Co. v. Draper*, 16 Idaho 541, 102 P. 7 (1909).

**Possession of Property of Decedent.**

After qualifying as such, an executor is charged with fiduciary duty of collecting, recovering and taking into possession all assets of testator and distribution of same in strict compliance with the law and he is responsible

for any loss occasioned by his culpable failure so to do. *Felton v. Anderton*, 67 Idaho 160, 174 P.2d 212 (1946).

The property of the estate, upon the testator's death, immediately passes to the possession of the executrix and the executor. *Blake v. Blake*, 69 Idaho 214, 205 P.2d 495 (1949).

**Workmen's Compensation Award.**

Where the beneficiary of workmen's compensation died before receiving the entire award for an employee's death, the exclusive duty of the beneficiary's administrator was to collect the balance unpaid. *State Ins. Fund v. Hunt*, 52 Idaho 639, 17 P.2d 354 (1932).

**RESEARCH REFERENCES**

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 497 et seq.

**C.J.S.** — 33 C.J.S., Executors and Administrators, §§ 274, 357.

**A.L.R.** — Who may exercise voting power of

corporate stock pending settlement of estate of deceased owner. 7 A.L.R.3d 629.

Liability of executor or administrator to estate because of overpaying or unnecessarily paying tax. 55 A.L.R.3d 785.

**COMMENT TO OFFICIAL TEXT**

Section 3-101 provides for the devolution of title on death. Section 3-711 defines the status of the personal representative with reference to "title" and "power" in a way that should make it unnecessary to discuss the "title" to decedent's assets which his personal representative acquires. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may need to institute against an heir or devisee. It may be possible for an heir or devisee to question the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

This code follows the Model Probate Code in regard to partnership interests. In the introduction to the Model Probate Code, the following appears at p. 22:

"No provisions for the administration of partnership estates when a partner dies have

been included. Several states have statutes providing that unless the surviving partner files a bond with the probate court, the personal representative of the deceased partner may administer the partnership estate upon giving an additional bond. *Kan. Gen. Stat. (Supp. 1943) §§ 59-1001 to 59-1005*; *Mo. Rev. Stat. Ann. (1942) §§ 81 to 93 [V.A.M.S. §§ 473.220 to 473.230]*. In these states the administration of partnership estates upon the death of a partner is brought more or less completely under the jurisdiction of the probate court. While the provisions afford security to parties in interest, they have caused complications in the settlement of partnership estates and have produced much litigation. *Woener, Administration* (3rd ed., 1923) §§ 128 to 130; annotation, 121 A.L.R. 860. These statutes have been held to be inconsistent with section 37 of the Uniform Partnership Act providing for winding up by the surviving partner. *Davis v. Hutchinson* (C.C.A. 9th, 1929) 36 F.(2d) 309. Hence the Model Probate Code contains no provision regarding partnership property except for inclusion in the inventory of the decedent's proportionate share of any partnership. See § 120. However, it is suggested that the Uniform Partnership Act should be included in the statutes of the states which have not already enacted it."

**15-3-710. Power to avoid transfers.** — The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his



creditors, and, subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative. The personal representative is not required to institute such an action unless requested by creditors who must pay or secure the cost and expenses of litigation. [I.C., § 15-3-710, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Homestead allowance and exempt property, § 15-2-401.

### JUDICIAL DECISIONS

**Cited in:** Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 102 Idaho 744, 639 P.2d 442 (1981).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Delivery of deed.  
Fraudulent conveyance.  
Intent of decedent.

#### **Delivery of Deed.**

In an action by the administrator of deceased's estate to set aside deceased's deed on grounds of fraud, the evidence was sufficient to show an irrevocable intent to transfer the property to defendant and sufficient to show constructive delivery, although the deed remained in the deceased's physical possession until death. *Johnson v. Brown*, 65 Idaho 359, 144 P.2d 198 (1943).

#### **Fraudulent Conveyance.**

Where it is not shown that action was brought on behalf of creditors, administrator cannot recover assets fraudulently conveyed. *Berryman v. Dore*, 47 Idaho 582, 277 P. 565 (1929).

Executor or administrator of deceased

debtor who has fraudulently conveyed his property occupies a double capacity as representative of deceased debtor and of his creditors. *Berryman v. Dore*, 47 Idaho 582, 277 P. 565 (1929).

#### **Intent of Decedent.**

Where it is shown that decedent, in making a conveyance to his daughter, acted in perfect good faith, and it is not claimed that such decedent had any intent to defraud, an action cannot be maintained under former similar section. *Brown v. Perrault*, 5 Idaho 729, 51 P. 752 (1898). But see *Berryman v. Dore*, 47 Idaho 582, 277 P. 565 (1929).

To set aside a sale made by a decedent, it must be shown that such sale was made with intent to defraud creditors. *Brown v. Perrault*, 5 Idaho 729, 51 P. 752 (1898).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 467.

**C.J.S.** — 33 C.J.S., Executors and Administrators, § 251 et seq.

### COMMENT TO OFFICIAL TEXT

Model Probate Code section 125, with additions. See, also, Section 6-201, which saves

creditors' rights in regard to nontestamentary transfers effective at death.

**15-3-711. Powers of personal representatives — In general.** — Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner

would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court. [I.C., § 15-3-711, as added by 1971, ch. 111, § 1, p. 233.]

JUDICIAL DECISIONS

ANALYSIS

De facto distribution.  
Invocation of court's jurisdiction.  
Solicitation of bids.

De Facto Distribution.

The personal representative exercises control over the property of the estate, in a fiduciary capacity, until the close of administration of the estate. Therefore, for purposes of will provision that personal representative would not take under will if she died prior to distribution, neither the act of controlling the estate property in her fiduciary capacity as personal representative nor the act of possessing the estate property as the beneficiary presumptively entitled thereto was sufficient to constitute de facto distribution of the estate. *Allen v. Shea*, 105 Idaho 31, 665 P.2d 1041 (1983).

Invocation of Court's Jurisdiction.

Where an administrator elected to invoke the court's jurisdiction to resolve the question whether, in the best interests of the estate, one of two bids should be accepted or new bids solicited, the administrator essentially waived his power to accept either bid by

petitioning the court for an order therefor. *Mediterranean Homes, Inc. v. Carnes*, 101 Idaho 70, 608 P.2d 873 (1980).

Solicitation of Bids.

Where an administrator, deeming himself in a somewhat precarious position due to the disparity between the several appraisements and offers, petitioned the magistrate for a resolution of the question how best to dispose of the property, and the magistrate's resolution of the question was that disposition of the property could best be effected by another solicitation of sealed bids, and order the administrator to do so, but where the order did not, however, require confirmation by the court for completion of the sale, the contemplated disposition, then, was not a judicial sale by the court through the administrator as agent for the court, but rather the solicitation of bids and acceptance of a bid by the administrator. *Mediterranean Homes, Inc. v. Carnes*, 101 Idaho 70, 608 P.2d 873 (1980).

COMMENT TO OFFICIAL TEXT

The personal representative is given the broadest possible "power over title." He receives a "power," rather than title, because the power concept eases the succession of assets which are not possessed by the personal representative. Thus, if the power is unexercised prior to its termination, its lapse clears the title of devisees and heirs. Purchasers from devisees or heirs who are "distributees" may be protected also by Section 3-910. The power over title of an absolute owner is conceived to embrace all possible transactions which might result in a conveyance or encumbrance of assets, or in a change

of rights of possession. The relationship of the personal representative to the estate is that of a trustee. Hence, personal creditors or successors of a personal representative cannot avail themselves of his title to any greater extent than is true generally of creditors and successors of trustees. Interested persons who are apprehensive of possible misuse of power by a personal representative may secure themselves by use of the devices implicit in the several sections of Parts 1 and 3 of this Article. See especially Sections 3-501, 3-605, 3-607, and 3-611.

**15-3-712. Improper exercise of power — Breach of fiduciary duty.**  
— If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in sections 15-3-713 and

15-3-714 of this Part. [I.C., § 15-3-712, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

### ANALYSIS

Personal representative.  
—Mismanagement.

#### Personal Representative.

##### —Mismanagement.

Where the personal representative's failure to safeguard the property of the estate resulted in the liquidation of an asset and payment to another of the cash proceeds, which rightfully belonged to the estate, and where the enrichment through any interest which could have been accrued from the time of the sale to the time of reimbursement should have been to the estate, not to those who stood to profit from the representative's mismanagement of the estate, it was proper for the magistrate to order the personal representative to pay interest at the statutory

rate on the proceeds of the sale of real estate. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

Where the personal representative mismanaged the property of the estate causing the trustee to accrue fees which were beyond those associated with the usual and ordinary duties of a trustee, the personal representative, as a fiduciary, is liable to the interested parties, such as the trustee, for the extraordinary costs incurred by the trustee. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

**Cited in:** *Allen v. Shea*, 105 Idaho 31, 665 P.2d 1041 (1983).

### DECISIONS UNDER PRIOR LAW

### ANALYSIS

Burden of proof of fairness.  
Consideration insufficient.  
Declaration of principle.  
Fraud.

#### Burden of Proof of Fairness.

Where the administratrix, through the interposition of a third party, purchased the interests of the beneficiaries of the trust, such imposes upon the administratrix the burden of proving the fairness of the transaction; she must disprove any fraud on her part. *Gibbins v. McLaughlin*, 79 Idaho 410, 319 P.2d 189 (1957).

#### Consideration Insufficient.

Transfer of interest in estate by heirs to executor is void, where only consideration was part payment in advance by the executor to the various heirs, as such consideration coming from a fiduciary is insufficient for transfer of all of their interest in the estate. *Burns v. Skogstad*, 69 Idaho 227, 206 P.2d 765 (1949).

#### Declaration of Principle.

Office of executor, or administrator, is highly fiduciary, and statute declaring that

executor or administrator cannot, directly or indirectly, purchase any property of the estate is a declaration of fundamental principle of trusteeship and prohibits trustee from dealing with any of the subject matter of the trust so as to personally profit. *Burns v. Skogstad*, 69 Idaho 227, 206 P.2d 765 (1949).

#### Fraud.

The finding of the trial court that appellant heirs failed to prove any fraud on respondent administratrix's part is fully supported by clear and convincing evidence, substantial and competent in nature, there being no attempt to conceal the value of the realty purchased by administratrix and her husband, heirs having full knowledge of its value and potential marketability of the timber located thereon. *Gibbins v. McLaughlin*, 79 Idaho 410, 319 P.2d 189 (1957).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 371, 398 et seq., 499, 500.

**C.J.S.** — 33 C.J.S., Executors and Administrators, §§ 274, 351 et seq.



**A.L.R.** — Liability of executor or administrator for negligence or default in defending action against estate. 14 A.L.R.3d 1036.

Liability of executor or administrator, or his bond, for loss caused to estate by act or default of his agent or attorney. 28 A.L.R.3d 1191.

Liability of executor, administrator,

trustee, or his counsel, for interest, penalty, or extra taxes assessed against estate because of tax law violations. 47 A.L.R.3d 507.

Liability of executor or administrator to estate because of overpaying or unnecessarily paying tax. 55 A.L.R.3d 75.

Garnishment against executor or administrator by creditor of estate. 60 A.L.R.3d 1301.

COMMENT TO OFFICIAL TEXT

An interested person has two principal remedies to forestall a personal representative from committing a breach of fiduciary duty. (1) Under Section 3-607 he may apply to the Court for an order restraining the personal representative from performing any specified act or from exercising any power in the course of administration. (2) Under Section 3-611 he may petition the Court for an order removing the personal representative.

Evidence of a proceeding, or order, restraining a personal representative from selling, leasing, encumbering or otherwise affecting

title to real property subject to administration, if properly recorded under the laws of this state, would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

In addition, Sections 1-302 and 3-105 authorize joinder of third persons who may be involved in contemplated transactions with a personal representative in proceedings to restrain a personal representative under Section 3-607.

**15-3-713. Sale, encumbrance or transaction involving conflict of interest — Voidable — Exceptions.** — Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one (1) who has consented after fair disclosure, unless:

(a) the will or a contract entered into by the decedent expressly authorized the transaction; or

(b) the transaction is approved by the court after notice to interested persons. [I.C., § 15-3-713, as added by 1971, ch. 111, § 1, p. 233.]

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

- Acquiescence by heirs.
- Authority of attorney.
- Fraud.
- Illegal lease.
- Indirect sales.
- Relief.
- Trusteeship.
- Voidable transactions.

**Acquiescence by Heirs.**

Acquiescence by heirs in an agreement with an administrator and his attorney, which was in violation of the fiduciary duties of the administrator and his attorney, did not bar the heirs from subsequently asserting reme-

dies against the administrator and such attorney, where the heirs had no knowledge of their rights until a date subsequent to the consummation of all of the acts relied upon as acquiescence and waiver. *Bruun v. Hanson*, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S.

571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

#### **Authority of Attorney.**

An attorney, employed by heirs to represent their interests in a corporation to which the heirs had conveyed their interests in mining claims in exchange for stock, had no authority to release the corporation and the administrator of the estate and his attorney from claims of the heirs against such administrator and his attorney, in an action whereby the administrator and his attorney accepted part of stock in settlement of their claims against the estate. *Bruun v. Hanson*, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

#### **Fraud.**

An administrator procuring an order for distribution to himself and brothers and sisters, as cousins of decedent, and who obtained a conveyance of the interest of the decedent's sister for a fraction of the value, is chargeable with fraud. *Diamond v. Connolly*, 276 F. 87 (9th Cir.), cert. denied, 257 U.S. 656, 42 S. Ct. 169, 66 L. Ed. 420 (1921).

#### **Illegal Lease.**

A lease by an executor of the decedent's property to the executor's son is illegal. In *re Fleshman's Estate*, 51 Idaho 312, 5 P.2d 727 (1931).

#### **Indirect Sales.**

Administrator's wife, who receives a deed from heir before final distribution, must show that it was intended that the property become her separate property, or the transaction will be void. In *re Blackinton's Estate*, 29 Idaho 310, 158 P. 492 (1916).

If executor of an estate persuades heirs to transfer assets to estate to nephew of executor, who in turn transferred assets to executor, such transfer was a sale in which the executor was interested, and one which injured to his personal profit, so that heirs could thereafter impress a trust on the estate of the deceased executor. *Burns v. Skogstad*, 69 Idaho 227, 206 P.2d 765 (1949).

#### **Relief.**

Where an administrator and his attorney accepted in settlement of their claims against an estate certain stock for which they were compelled to account, the heirs were entitled to such relief as would deprive the administrator and said attorney of the "profits" made on the transaction, including excess of money and stock received over the amount of claims against the estate, and possibly, in case of the attorney, necessary expenses in connection

with subsequent transactions. *Bruun v. Hanson*, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

#### **Trusteeship.**

Former statute was but a declaration of a fundamental principle of trusteeship inhibiting trustees from dealing with the subject-matter of their trusts in any way which may inure to their personal benefit. *Bruun v. Hanson*, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

Where an administrator and his attorney accepted for their services shares of stock obtained by heirs in exchange for inherited mining claims, and subsequently exchanged such shares for stock in an Idaho corporation, the heirs were entitled to a decree, under these circumstances, that the administrator and his attorney held the stock as trustees for them and were entitled to an account for the proceeds thereof. *Bruun v. Hanson*, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

Former statute prohibited attorney for administrator of an estate from dealing with the property of the estate in any way that might inure to his personal benefit. *Bruun v. Hanson*, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

#### **Voidable Transactions.**

Though the purchase by a representative at his own sale is voidable, a deed from him conveying the property to a bona fide purchaser for a valuable consideration will pass title; after such conveyance, the original purchase by the representative at his own sale will not be set aside, since a sale to an innocent purchaser for valuable consideration without notice of any taint of fraud by his grantor will not be set aside. *Swinehart v. Turner*, 44 Idaho 461, 259 P. 3 (1927).

A purchase by a trustee from his cestui que trust is not void, but is voidable transaction subject to being satisfied on behalf of the beneficiary, provided a want of equity and fair dealing appears and provided the beneficiary acts to avoid the transaction with reasonable promptness. *Gibbins v. McLaughlin*, 79 Idaho 410, 319 P.2d 189 (1957).

The sale by appellant heirs of their distributive interest in decedent's real property, and purchase thereof by respondent administratrix and her husband, is not a void transaction as a matter of law. *Gibbins v. McLaughlin*, 79 Idaho 410, 319 P.2d 189 (1957).

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 733 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 348 et seq., 378 et seq.

COMMENT TO OFFICIAL TEXT

If a personal representative violates the duty against self-dealing described by this section, a voidable title to assets sold results. Other breaches of duty relating to sales of assets will not cloud titles except as to pur-

chasers with actual knowledge of the breach. See Section 3-714. The principles of bona fide purchase would protect a purchaser for value without notice of defect in the seller's title arising from conflict of interest.

**15-3-714. Persons dealing with personal representative — Protection.** — A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in section 15-3-504 of this code, and without regard to the constructive notice provisions of section 15-1-305A of this code, no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries. [I.C., § 15-3-714, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

JUDICIAL DECISIONS

**Cited in:** *AgAmerica v. Westgate*, 129 Idaho 621, 931 P.2d 1 (Ct. App. 1997).

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 138, 787 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 350, 394, 417, 418, 457.



## COMMENT TO OFFICIAL TEXT

This section qualifies the effect of a provision in a will which purports to prohibit sale of property by a personal representative. The provisions of a will may prescribe the duties of a personal representative and subject him to surcharge or other remedies of interested persons if he disregards them. See Section 3-703. But, the will's prohibition is not relevant to the rights of a purchaser unless he had actual knowledge of its terms. Interested persons who want to prevent a personal representative from having the power described here must use the procedures described in Sections 3-501 to 3-505. Each state will need to identify the relation between this section and other statutory provisions creating liens on estate assets for inheritance and other taxes. The section cannot control whether a purchaser takes free of the lien of unpaid federal estate taxes. Hence, purchasers from personal representatives appointed pursuant to this Code will have to satisfy themselves concerning whether estate taxes are paid, and if not paid, whether the tax lien follows the property they are acquiring. See Section 6234,

Internal Revenue Code [26 U.S.C.S. § 6324].

The impact of formal recording systems beyond the usual probate procedure depends upon the particular statute. In states in which the recording system provides for recording wills as muniments of title, statutory adaptation should be made to provide that recording of wills should be postponed until the validity has been established by probate or limitation. Statutory limitation to this effect should be added to statutes which do not so provide to avoid conflict with power of the personal representative during administration. The purpose of the Code is to make the deed or instrument of distribution the usual muniment of title. See sections 3-907, 3-908, 3-910. However, this is not available when no administration has occurred and in that event reliance upon general recording statutes must be had.

If a state continues to permit wills to be recorded as muniments of title, the above section would need to be qualified to give effect to the notice from recording.

**15-3-715. Transactions authorized for personal representatives — Exceptions.** — Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 15-3-902 of this code, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) Receive assets from fiduciaries, or other sources;

(3) Exercise the same power as the decedent in performance, compromise or refusal to perform the decedent's contracts which continue as obligations of the decedent's estate. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action may:

(a) execute and deliver a deed of conveyance for cash payment of all sums remaining due on the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;

(4) Satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) If funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the

estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) Acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(7) Make ordinary or extraordinary repairs or alterations in building[s] or other structures, demolish any improvements, raze existing or erect new party walls or buildings;

(8) Subdivide, develop or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; or adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;

(9) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;

(10) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) Abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate;

(12) Vote stocks or other securities in person or by general or limited proxy;

(13) Pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

(14) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;

(15) Insure the assets of the estate against damage, loss and liability and himself against liability as to third persons;

(16) Borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate;

(17) Effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;

(18) Pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;

(19) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(20) Allocate items of income or expense to either estate income or principal, as permitted or provided by law;

(21) Employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one (1) or more agents to perform any act of administration, whether or not discretionary;

(22) Prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(23) Sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances;

(24) Continue any unincorporated business or venture in which the decedent was engaged at the time of his death (a) in the same business form for a period of not more than four (4) months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will, (b) in the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or (c) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(25) Incorporate any business or venture in which the decedent was engaged at the time of his death;

(26) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate;

(27) Satisfy and settle claims and distribute the estate as provided in this code. [I.C., § 15-3-715, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

The bracketed "s" in subdivision (7) was inserted by the compiler.

### JUDICIAL DECISIONS

#### ANALYSIS

Mismanagement.  
Solicitation of bids.

#### Mismanagement.

Where the personal representative's failure to safeguard the property of the estate resulted in the liquidation of an asset and payment to another of the cash proceeds, which rightfully belonged to the estate, and

where the enrichment through any interest which could have been accrued from the time of the sale to the time of reimbursement should be to the estate, not to those who stood to profit from the representative's mismanagement of the estate, it was proper for the



magistrate to order the personal representative to pay interest at the statutory rate on the proceeds of the sale of real estate. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

**Solicitation of Bids.**

Where an administrator, deeming himself in a somewhat precarious position due to the disparity between the several appraisements and offers, petitioned the magistrate for a resolution of the question how best to dispose of the property, and the magistrate's resolu-

tion of the question was that disposition of the property could best be effected by another solicitation of sealed bids, and ordered the administrator to do so, but where the order did not, however, require confirmation by the court for completion of the sale, the contemplated disposition was not a judicial sale by the court through the administrator as agent for the court, but rather the solicitation of bids and acceptance of a bid by the administrator. *Mediterranean Homes, Inc. v. Carnes*, 101 Idaho 70, 608 P.2d 873 (1980).

DECISIONS UNDER PRIOR LAW

ANALYSIS

In general.

Actions.

Award of compensation.

Construction.

Continuance of decedent's business.

Conveyances.

Expenses of last illness.

Leases.

Reappraisal.

**In General.**

Sole resident executor, having management and control of estate by agreement with other executor and the heirs and devisees, was properly considered as qualified to sign a remonstrance to a paving improvement district. *Cole v. Lewiston*, 50 Idaho 179, 295 P. 430 (1930).

**Actions.**

An administrator is the proper party to quiet title or to remove a cloud from the title to property belonging to the estate. *Cleland v. McLaurin*, 40 Idaho 371, 232 P. 571 (1925).

**Award of Compensation.**

Where an employee's death occurred after he sustained compensable injury from causes other than the compensable accident, award made under special schedule for fixed definite loss, although determined after employee's death, was recoverable by the administrator since the right to the award was fixed at the time of the accident. *Mahoney v. Payette*, 64 Idaho 443, 133 P.2d 927 (1943).

**Construction.**

The executor's power to borrow money, to execute a lease, and to continue the testator's business depends upon the will or statute and must be strictly pursued. In *re Fleshman's Estate*, 51 Idaho 312, 5 P.2d 727 (1931).

**Continuance of Decedent's Business.**

Upon the death of one partner, the surviving partner may continue the business by and with the consent of the executor or administrator of the estate of the deceased and the

approval of the probate court; but, unless by consent of executor or administrator of the estate of the deceased partner, and the approval of the probate court, it is the duty of the surviving partner to settle the affairs of the copartnership as speedily as the best interests of the business of partnership will permit. *McElroy v. Whitney*, 12 Idaho 512, 88 P. 349 (1906).

An administrator is not required to continue the business of the deceased. If he does so, he assumes responsibility for all of the losses incurred and must account for any profits so earned. *Schneeberger v. Frazer*, 36 Idaho 737, 213 P. 568 (1923).

Where partnership business would have been greatly diminished in value to have shut down on death of one partner, and administratrix knew that surviving partners were operating the business and made no demand that the business cease, the administratrix did not violate former law by her failure to consent to continuance of the business. *Varkas v. Varkas*, 64 Idaho 297, 130 P.2d 867 (1942).

**Conveyances.**

No claim against estate for money arises from action of executor in failing and refusing to execute deed in pursuance to testator's contract. *Blake v. Lemp*, 32 Idaho 158, 179 P. 737 (1919).

An administrator's sale of realty will not be set aside to the prejudice of the purchaser without an allegation and proof that the purchaser was a party to the fraud at the sale. *Swinehart v. Turner*, 38 Idaho 602, 224 P. 74

(1924); *Harkness v. Hartwick*, 49 Idaho 794, 292 P. 592 (1930).

#### **Expenses of Last Illness.**

Under a will directing the executor to pay the expenses of the testator incurred by sickness, the executor is authorized to pay for nursing of the testator during his last illness, notwithstanding the absence of a verified claim therefor. *Hubbard v. Ball*, 59 Idaho 78, 81 P.2d 73 (1938).

#### **Leases.**

An executor who permitted a tenant to continue in possession of land belonging to the estate at the expiration of a one-year lease in the mistaken belief that the lease was for three years, where such continuance was allowed without a new lease being executed and without approval of the probate judge, under these circumstances, was not chargeable with

unlawful renting of the land, especially where it was not shown that the rent collected was inadequate or the estate had suffered by failure to secure execution of a formal lease approved by the probate judge. *Hubbard v. Ball*, 59 Idaho 78, 81 P.2d 73 (1938).

#### **Reappraisal.**

Where it appeared that a reappraisal of property was proper, the fact that such reappraisal was held on the day of confirmation of the administrator's sale of realty is insufficient to show anything improper in connection therewith. *Harkness v. Hartwick*, 49 Idaho 794, 292 P. 592 (1930).

Reappraisal of property ordered sold by administratrix was properly ordered, it appearing that original appraisal was too high. *Harkness v. Hartwick*, 49 Idaho 794, 292 P. 592 (1930).

### **RESEARCH REFERENCES**

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 366 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 168 et seq., 212 et seq.

**A.L.R.** — Who may exercise voting power of corporate stock pending settlement of estate of deceased owner. 7 A.L.R.3d 629.

Duty and liability of executor with respect to locating and noticing legatees, devisees, or heirs. 10 A.L.R.3d 547.

Right of executor or administrator to appeal from order granting or denying distribution. 16 A.L.R.3d 1274.

### **COMMENT TO OFFICIAL TEXT**

This section accepts the assumption of the Uniform Trustee's Powers Act that it is desirable to equip fiduciaries with the authority required for the prudent handling of assets and extends it to personal representatives. The section requires that a personal representative act reasonably and for the benefit of the interested person. Subject to this and to the other qualifications described by the preliminary statement, the enumerated transactions are made authorized transactions for personal representatives. Sub-paragraphs (27) and (18) support the other provisions of the Code, particularly Section 3-704, which contemplates that personal representatives will proceed with all of the business of administration without court orders.

In part, sub-paragraph (4) involves a substantive question of whether noncontractual charitable pledges of a decedent can be honored by his personal representative. It is believed, however, that it is not desirable from a practical standpoint to make much turn on

whether a charitable pledge is, or is not, contractual. Pledges are rarely made the subject of claims. The effect of sub-paragraph (4) is to permit the personal representative to discharge pledges where he believes the decedent would have wanted him to do so without exposing himself to surcharge. The holder of a contractual pledge may, of course, pursue the remedies of a creditor. If a pledge provides that the obligation ceases on the death of the pledgor, no personal representative would be safe in assuming that the decedent would want the pledge completed under the circumstances.

Subsection (3) is not intended to affect the right to performance or to damages of any person who contracted with the decedent. To do so would constitute an unreasonable interference with private rights. The intention of the subsection is simply to give a personal representative who is obligated to carry out a decedent's contracts the same alternatives in regard to the contractual duties which the decedent had prior to his death.

**15-3-716. Powers and duties of successor personal representative.** — A successor personal representative has the same power and duty as the original personal representative to complete the administration and



distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will. [I.C., § 15-3-716, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1029 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1040 et seq.

**15-3-717. Corepresentatives — When joint action required.** — If two (2) or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of a majority is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any corepresentative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a corepresentative has been delegated to act for the others. Persons dealing with a corepresentative if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative. [I.C., § 15-3-717, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 992 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1176 et seq.

**A.L.R.** — Judicial resolution of impasse between joint executors or administrators where concurrent action is required. 85 A.L.R.3d 1124.

#### COMMENT TO OFFICIAL TEXT

With certain qualifications, this section is designed to compel corepresentatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A corepresentative who abdicates

his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by Section 3-703. Section 3-715(21) authorizes some limited delegations, which are reasonable and for the benefit of interested persons.

**15-3-718. Powers of surviving personal representative.** — Unless the terms of the will otherwise provide, every power exercisable by personal corepresentatives may be exercised by the one (1) or more remaining after the appointment of one (1) or more is terminated, and if one (1) of two (2) or more nominated as coexecutors is not appointed, those appointed may exercise all the powers incident to the office. [I.C., § 15-3-718, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 274, 988 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 1174, 1175.



## COMMENT TO OFFICIAL TEXT

Source, Model Probate Code section 102. This section applies where one of two or more co-representatives dies, becomes disabled or is removed. In regard to co-executors, it is based on the assumption that the decedent would not consider the powers of his fiducia-

ries to be personal, or to be suspended if one or more could not function. In regard to co-administrators in intestacy, it is based on the idea that the reason for appointing more than one ceases on the death or disability of either of them.

**15-3-719. Compensation of personal representative.** — A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative may also renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court. [I.C., § 15-3-719, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

**Fees and Services.**

Where the personal representative for the estate failed to bear her burden of proving her requests for reimbursement, the estate did not benefit from her representation, and the estate had to expend substantial costs in

litigation against her, the magistrate properly concluded that the personal representative was not entitled to a fee for serving as representative for the estate. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

## DECISIONS UNDER PRIOR LAW

**Fees and Services.**

Fee must bear some relation to the value of services rendered. *Chapman v. Ada County*, 48 Idaho 632, 284 P. 259 (1930).

An executor or administrator must be appointed to take possession of and care for the property of an estate, and whether such appointment turns out to be legal or illegal, such person, whether representing the estate as executor or administrator, de facto or de jure, is equally liable for the care of the estate and is entitled to his lawful expenses and disbursements in connection therewith. In re *Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

It was the duty of the executor to collect all debts due to the decedent or to the estate, for which services the former statute fixed his compensation. *Davenport v. Simons*, 68 Idaho 21, 189 P.2d 90 (1947).

Where the executor and administrator must account for the entire community estate, it would follow that an executor and his attorney were entitled to compensation computed upon the entire community estate accounted for plus the separate estate of the deceased, and not upon the half of the community property belonging to the deceased, plus his separate estate. *Davenport v. Simons*, 68 Idaho 21, 189 P.2d 90 (1947).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 836 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 970 et seq.

**A.L.R.** — Limiting effect of provision in contract, will, or trust instrument fixing

trustee's or executor's fees. 19 A.L.R.3d 520.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation. 96 A.L.R.3d 1102.

COMMENT TO OFFICIAL TEXT

This section has no bearing on the question of whether a personal representative who also serves as attorney for the estate may receive compensation in both capacities. If a will provision concerning a fee is framed as a condition on the nomination as personal representative, it could not be renounced.

**15-3-720. Expenses in estate litigation.** — If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney’s fees incurred. [I.C., § 15-3-720, as added by 1971, ch. 111, § 1, p. 233.]

JUDICIAL DECISIONS

ANALYSIS

Attorney’s fees.  
Benefit for estate.  
Recoverable expenses.

**Attorney’s Fees.**

If the estate itself, as apart from the personal representative of the estate, was to be entitled to an award of attorney fees against the surviving spouse, it would be necessary for the estate to establish that the defense by the surviving spouse to an appeal from the order appointing a personal representative was being maintained frivolously, unreasonably or without foundation. *Shaw v. Bowman*, 101 Idaho 131, 609 P.2d 663 (1980).

A personal representative who litigates his own personal interests or bequests is not entitled to attorney fees for such litigation from the estate under this section. *Marriage v. Berriochoa*, 108 Idaho 474, 700 P.2d 96 (Ct. App. 1985).

**Benefit for Estate.**

The services rendered by the personal rep-

resentative, for which he seeks reimbursement, must benefit the estate and cannot be incurred to protect personal interests. *Eliassen v. Fitzgerald*, 105 Idaho 234, 668 P.2d 110 (1983).

**Recoverable Expenses.**

Personal representative was entitled to recover attorney’s fees incurred as result of contesting of the widow’s rights to family allowance, homestead and exempt property, as well as attorney’s fees incurred by the personal representative in his efforts to remain the personal representative. *Eliassen v. Fitzgerald*, 105 Idaho 234, 668 P.2d 110 (1983).

**Cited in:** *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Attorney’s fees.  
Expenses in general.

**Attorney’s Fees.**

An attorney appointed executor or administrator is not entitled to attorney fees either for himself or his law partner unless a necessity is shown for the employment of legal assistance. *Needham v. Needham*, 34 Idaho 193, 200 P. 346 (1921).

Fee for attorney’s services is a proper charge against estate when such services are necessary. Executor must make a full and complete disclosure of extent, character, and

reasonable value of such services from which court may determine proper amount to be allowed. In *re Peterson’s Estate*, 38 Idaho 195, 220 P. 1086 (1923).

Executor or administrator will not be allowed counsel fees when incurred by such executor or administrator in prosecuting his own personal claim against the estate. In *re Peterson’s Estate*, 38 Idaho 195, 220 P. 1086 (1923).

In an action for accounting against an ex-

ecutor, a claim for attorney's fee was properly denied where it was shown that it was problematical that fee was for services rendered executor. *Felton v. Anderton*, 67 Idaho 160, 174 P.2d 212 (1946).

### **Expenses in General.**

Executor's expenses, incurred as a result of an appeal taken by residuary legatee, are a charge against the estate, although sought to be charged against the residuary legatee's share. *Needham v. Needham*, 34 Idaho 193, 200 P. 346 (1921).

A determination that a will in favor of executrices had been secured by their undue influence deprived them of the right of reim-

bursement for expenses and fees incurred in previous suits attempting to sustain the validity of the will, except expenses which must have been incurred by anyone handling the estate. In *re Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

Executors or administrators must be appointed to care for the property of an estate, and, whether the appointment is legal or illegal, such person is equally liable for the care of the estate and is entitled to his lawful expenses and disbursements in connection therewith. In *re Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

## **RESEARCH REFERENCES**

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 428 et seq., 895.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1071 et seq.

**A.L.R.** — Disciplinary proceeding based upon attorney's naming of himself or associate as executor or attorney for executor in will drafted by him. 57 A.L.R.3d 703.

Amount of attorney's compensation in pro-

ceedings involving wills and administration of decedents' estates. 58 A.L.R.3d 317.

Liability of estate for legal services of attorney employed by estate attorney without consent of executor or administrator. 83 A.L.R.3d 1160.

Excessiveness or adequacy of attorneys' fees in matters involving real estate — modern cases. 10 A.L.R.5th 448.

## **COMMENT TO OFFICIAL TEXT**

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, he is an interested person within the meaning of sections 3-301 and 3-401. Section 3-912 gives the successors of an estate control over the executor, provided all are competent adults.

So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the Code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.

### **15-3-721. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate.**

— After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered



may be ordered to make appropriate refunds. [I.C., § 15-3-721, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### Compensation.

It is the duty of the executor to collect all debts due to decedent or to the estate for which services the statute fixes his compensation, and allowance of an additional fee for

extraordinary services in collecting accounts is void in the absence of a showing of any extraordinary services. *Davenport v. Simons*, 68 Idaho 21, 189 P.2d 90 (1947).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 428 et seq., 841.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1071.

## COMMENT TO OFFICIAL TEXT

In view of the broad jurisdiction conferred on the probate court by Section 3-105, description of the special proceeding authorized by this section might be unnecessary. But, the Code's theory that personal representatives may fix their own fees and those of estate attorneys marks an important departure

from much existing practice under which fees are determined by the court in the first instance. Hence, it seemed wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy.

## PART 8. CREDITORS' CLAIMS

**15-3-801. Notice to creditors.** — (a) Unless notice has already been given under this section, a personal representative upon his appointment may publish a notice to creditors once a week for three (3) successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within four (4) months after the date of the first publication of the notice or be forever barred.

(b) A personal representative may give written notice by mail or other delivery to any creditor, notifying the creditor to present his claim within four (4) months after the published notice if given as provided in subsection (a) of this section or within sixty (60) days after the mailing or delivery of the notice, whichever is later, or be forever barred. Written notice must be the notice described in subsection (a) of this section or a similar notice.

(c) The personal representative is not liable to any creditor or to any successor of the decedent for giving or failing to give notice under this section.

(d) If medical assistance was paid on behalf of the decedent when the decedent was fifty-five (55) years of age or older, the personal representative shall provide written notice as required by section 56-218(5), Idaho Code. [I.C., § 15-3-801, as added by 1971, ch. 111, § 1, p. 233; am. 1991, ch. 87, § 1, p. 192; am. 1998, ch. 9, § 2, p. 106.]

## JUDICIAL DECISIONS

**Time Limit.**

Where the claim of the administratrix for services rendered to decedent prior to death was not filed until well beyond the allowable four month period, the administratrix's claim was correctly disallowed since it was un-

timely filed. In re Estate of Lewis, 97 Idaho 299, 543 P.2d 852 (1975).

**Cited in:** Bingham Mem. Hosp. v. Boyd, 134 Idaho 669, 8 P.3d 664 (Ct. App. 2000).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Appeal.

Property subject to claims.

**Appeal.**

Failure to allege and prove the presentation of a claim to the administratrix at the trial cannot be raised for the first time on appeal. *Frasier v. Carter*, 92 Idaho 79, 437 P.2d 32 (1968).

**Property Subject to Claims.**

All property of estate constitutes a trust fund for benefit of creditors. *Madison v. Buhl*, 51 Idaho 564, 8 P.2d 271 (1932).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 620 et seq., 640 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 561.

**A.L.R.** — Validity of claims against estate filed prior to publication of notice to creditors. 70 A.L.R.3d 784.

## COMMENT TO OFFICIAL TEXT

**[General comment to §§ 15-3-801 — 15-3-817.]**

The need for uniformity of law regarding creditors' claims against estates is especially strong. Commercial and consumer credit depends upon efficient collection procedures. The cost of credit is pushed up by the cost of credit life insurance which becomes a practical necessity for lenders unwilling to bear the expense of understanding or using the cumbersome and provincial collection procedures found in 50 codes of probate.

The sections which follow facilitate collection of claims against decedents in several ways. First, a simple written statement mailed to the personal representative is a sufficient "claim." Allowance of claims is handled by the personal representative and is assumed if a claimant is not advised of disallowance. Also, a personal representative may pay any just claims without presentation and at any time, if he is willing to assume risks which will be minimal in many cases. The period of uncertainty regarding possible claims is only four months from first publication. This should expedite settlement and distribution of estates.

**Comment to § 15-3-801.**

Section 3-1203, relating to small estates, contains an important qualification on the

duty created by this section.

In 1989, the Joint Editorial Board recommended replacement of the word "shall" with "[may] [shall]" in (a) to signal its approval of a choice between mandatory publication and optional publication of notice to creditors to be made by the legislature in an enacting state. Publication of notice to creditors is quite expensive in some populous areas of the country and, if *Tulsa Professional Collection Services v. Pope*, 108 S. Ct. 1340, 485 U.S. 478 (1988) applies to this code, is useless except to bar unknown creditors. Even if *Pope* does not apply, personal representatives for estates involving successors willing to assume the risk of unbarred claims should have (and have had under the code as a practical consequence of absence of Court supervision and mandatory closings) the option of failing to publish.

Additional discussion of the impact of *Pope* on the Code appears in the Comment to Section 3-803, *infra*.

If a state elects to make publication of notice to creditors a duty for personal representatives, failure to advertise for claims would involve a breach of duty on the part of the personal representative. If, as a result of such breach, a claim is later asserted against a distributee under Section 3-1004, the per-

sonal representative may be liable to the distributee for costs related to discharge of the claim and the recovery of contribution from other distributees. The protection afforded personal representatives under Section 3-1003 would not be available, for that section applies only if the personal representative truthfully recites that the time limit for presentation of claims has expired.

Putting aside *Pope* case concerns regarding state action under this code, it might be appropriate, by legislation, to channel publications through the personnel of the probate

Court. *See* Section 1-401. If notices are controlled by a centralized authority, some assurance could be gained against publication in newspapers of small circulation. Also, the form of notices could be made uniform and certain efficiencies could be achieved. For example, it would be compatible with this section for the Court to publish a single notice each day or each week listing the names of personal representatives appointed since the last publication, with addresses and dates of non-claim.

**15-3-802. Statutes of limitations.** — (a) Unless an estate is insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim barred by a statute of limitations at the time of the decedent’s death may be allowed or paid.

(b) The running of a statute of limitations measured from an event other than death or the giving of notice to creditors is suspended during the four (4) months following the decedent’s death but resumes thereafter as to claims not barred pursuant to the sections which follow.

(c) For purposes of a statute of limitations, the proper presentation of a claim under section 15-3-804, Idaho Code, is equivalent to commencement of a proceeding on the claim. [I.C., § 15-3-802, as added by 1971, ch. 111, § 1, p. 233; am. 1978, ch. 350, § 12, p. 914; am. 1991, ch. 87, § 2, p. 192.]

JUDICIAL DECISIONS

**Applicability.**

Direction to the district court on remand to consider all applicable laws relating to the issue of timeliness of notice of decedent’s death, where the issue of the applicability of subsection (b) of this section was considered

by the Supreme Court on plaintiff’s first appeal, required the district court to consider the applicability of subsection (b). *Trimble v. Engelking*, 134 Idaho 195, 998 P.2d 502 (2000).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Claim barred.

Claim not barred.

**Claim Barred.**

A claim, arising out of contract, which is not presented until after time for presentation has expired is barred; and, after its denial, no action can be maintained thereon. *Lundy v. Lemp*, 32 Idaho 164, 179 P. 738 (1919).

caring for testator continuously until his death according to an oral agreement entered into more than four years prior to death was not barred by limitation since limitations were tolled until end of period for which services were rendered. *Hubbard v. Ball*, 59 Idaho 78, 81 P.2d 73 (1938).

**Claim Not Barred.**

Claim, duly filed, for services rendered in

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 600 et seq., 672 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 556 et seq.



**A.L.R.** — Running of statute of limitations as affected by doctrine of relating back of appointment of administrator. 3 A.L.R.3d 1234.

Effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose

favor it would have accrued. 28 A.L.R.3d 1141.

Tolling or interruption of running of statute of limitations pending appointment of executor or administrator for tortfeasor in personal injury or death action. 47 A.L.R.3d 179.

#### COMMENT TO OFFICIAL TEXT

This section means that four months is added to the normal period of limitations by reason of a debtor's death before a debt is barred. It implies also that after the expiration of four months from death, the normal statute of limitations may run and bar a claim even though the non-claim provisions of Section 3-803 have not been triggered. Hence, the non-claim and limitation provisions of Section 3-803 are not mutually exclusive.

It should be noted that under Sections 3-803 and 3-804 it is possible for a claim to be barred by the process of claim, disallowance and failure by the creditor to commence a proceeding to enforce his claim prior to the end of the four month suspension period. Thus, the regular statute of limitations applicable during the debtor's lifetime, the non-claim provisions of Sections 3-803 and 3-804, and the three-year limitation of Section 3-803 all have potential application to a claim. The first of the three to accomplish a bar controls.

In 1975, the Joint Editorial Board recommended a change that makes it clear that

only those successors who would be affected thereby, must agree to a waiver of a defense of limitations available to an estate. As the original text stood, the section appeared to require the consent of "all successors," even though this would include some who, under the rules of abatement, could not possibly be affected by allowance and payment of the claim in question.

In 1989, in connection with other amendments recommended in sequel to *Tulsa Professional Collection Services v. Pope*, 108 S. Ct. 1340, 485 U.S. 478 (1988), the Joint Editorial Board recommended the splitting out, into Subsections (b) and (c), of the last two sentences of what formerly was a four-sentence section. The first two sentences now appear as Subsection (a). The rearrangement aids understanding that the section deals with three separable ideas. No other change in language is involved, and the timing of the changes to coincide with *Pope* case amendments is purely coincidental.

**15-3-803. Limitations on presentation of claims.** — (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof (except claims for state taxes), whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(1) three (3) years after the decedent's death; or

(2) within the time provided in section 15-3-801(b), Idaho Code, for creditors who are given actual notice, and within the time provided in section 15-3-801(a), Idaho Code, for all creditors barred by publication.

(b) All claims described in subsection (a) of this section barred by the nonclaim statute of the decedent's domicile before the giving of notice to creditors in this state are also barred in this state.

(c) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof (except claims for state taxes), whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) a claim based on a contract with the personal representative, within four (4) months after performance by the personal representative is due; (2) any other claim, within the later of four (4) months after it arises, or the time specified in subsection (a)(1) of this section.

(d) Claims relating to state taxes, whether due or to become due, absolute or contingent, liquidated or unliquidated, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(1) three (3) years from the latest of:

(i) the date of the decedent's death,

(ii) the due date of the return (without regard to extensions), or

(iii) the date the return was filed; or

(2) within the time provided in section 63-3068(e) or 63-3633(e), Idaho Code, if the state tax commission has been given written notice in accordance with the provisions of those sections.

(e) Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance;

(3) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate; or

(4) assessment or collection of state taxes arising from activities or transactions of the estate; or

(5) assessment or collection of state taxes if a return has not been filed with the state tax commission. [I.C., § 15-3-803, as added by 1991, ch. 87, § 4, p. 192; am. 1997, ch. 113, § 2, p. 274; am. 2004, ch. 130, § 1, p. 448.]

### STATUTORY NOTES

**Prior Laws.** — Former § 15-3-803, which comprised I.C., § 15-3-803, as added by 1971, ch. 111, § 1, p. 233; 1971, ch. 126, § 1, p. 487; 1972, ch. 201, § 13, p. 510; 1973, ch. 167, § 12, p. 319, was repealed by S.L. 1991, ch. 87, § 3, p. 192.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

### JUDICIAL DECISIONS

#### ANALYSIS

Claim barred.

Interest.

Judgment creditor's claims.

#### Claim Barred.

Where plaintiff's amended complaint against the decedent's estate on his claim for personal injuries was filed nearly one year after the expiration of the two-year statute of limitations, his claim was time-barred unless it related back to the date of filing of the

original complaint. *Damian v. Estate of Pina*, 132 Idaho 447, 974 P.2d 93 (Ct. App. 1999).

Under § 56-218, the Idaho department of health and welfare could not recover Medicaid benefits paid to a decedent until his spouse died, but its claim for reimbursement was still subject to the deadlines of this section; as the

department did not present its claim within two years after the decedent's death, the claim was untimely. *State v. Estate of Kaminsky* (In re Estate of Kaminsky), 141 Idaho 436, 111 P.3d 121 (2005).

#### **Interest.**

Under this section and §§ 15-3-804 and 15-3-806, the interest on plaintiff hospital's claim could not begin to accumulate until six months after the personal representative first published his notice to creditors. *Bingham Mem. Hosp. v. Boyd*, 134 Idaho 669, 8 P.3d 664 (Ct. App. 2000).

#### **Judgment Creditor's Claims.**

Shareholder's estate was entitled to summary judgment dismissing judgment credi-

tor's claim to pierce the corporate veil where judgment creditor failed to file a claim in shareholder's estate within four months after the publication of notice to creditors, as provided by subdivision (a)(1) of this section; however, where judgment creditor's other claim against shareholder's estate was based on fraudulent transfer of assets, a claim not founded in contract, the trial court should not have dismissed it under subdivision (a)(1) of this section. *Magic Valley Radiation v. Kolouch*, 123 Idaho 434, 849 P.2d 107 (1993).

**Cited in:** *Trimble v. Engelking*, 134 Idaho 195, 998 P.2d 502 (2000).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

#### **Appeals.**

Assignment of expectancy.

Attorney's fee.

Claim arising after decedent's death.

Claim barred.

Claims founded on contract.

Claims of United States.

Foreign corporations.

Liens.

Mortgages.

Payment of claims.

Partition.

Services.

Trusts.

Waiver of defects.

#### **Appeals.**

Former wife of deceased should not be heard for the first time on matters de novo in the district court or supreme court on issues never presented before the probate court namely, a claim in which deceased having agreed to pay her monthly installments for the rest of her life within the time limited in notice to creditors to apply for or secure order extending time. *In re Lincoln's Estate*, 79 Idaho 131, 312 P.2d 113 (1957).

#### **Assignment of Expectancy.**

Claim arising out of assignment of expectancy under will does not place assignee in privity with testator or give him claim against his estate that is required to be filed with executors. *Casady v. Scott*, 40 Idaho 137, 237 P. 415 (1924).

#### **Attorney's Fee.**

An attorney's claim which arose in the administration of an estate, as distinguished from claims against decedent, being a lien on real property, was not lost by failure to make presentation and allowance. *Miller v. Monroe*,

50 Idaho 726, 300 P. 362 (1931).

#### **Claim Arising After Decedent's Death.**

In a wrongful death action brought by a widow on behalf of herself and her surviving children alleging that the defendant's negligence caused her husband's death, wherein the defendant filed a third-party complaint against the estate of the husband for the purpose of seeking indemnity or contribution for the alleged contributory negligence of the husband, neither subsection (a) nor (b) of this section operated as a bar to the defendant's claim for indemnity or contribution since both subsections only apply to bar claims which arose "before the death of the decedent." *Schiess v. Bates*, 107 Idaho 794, 693 P.2d 440 (1984).

#### **Claim Barred.**

Where the claim against the personal representative of the decedent claiming a right to additional proceeds under the decedent's life insurance policy was filed nearly five years after the death of the decedent, the claim was barred by subsection (b) of this section. *Witt v.*



Jones, 111 Idaho 165, 722 P.2d 474 (1986).

### **Claims Founded on Contract.**

Action cannot be maintained on claim arising out of contract, when such claim is not presented within time limited by law. *Lundy v. Lemp*, 32 Idaho 162, 179 P. 738 (1919).

Where the purchaser of land from the decedent had paid a portion of the purchase-price and, after the grantor died, offered to pay balance to the administrator and the administrator refused to accept the same and vendee then sought a return of the money paid, presentation of the claim was necessary. *Lundy v. Lemp*, 32 Idaho 162, 179 P. 738 (1919).

Claim arising out of contract is required to be presented in order to entitle it to subject other property of estate to payment of any deficiency remaining after foreclosure and sale of mortgaged property. *Devereaux Mtg. Co. v. Huggins*, 46 Idaho 74, 266 P. 421 (1928).

A claim by a former ward against the heirs, devisees, and grantees of surety of the deceased guardian for an accounting is not a claim arising upon a contract and failure to file against the surety's estate does not prevent recovery on the claim. *Madison v. Buhl*, 51 Idaho 564, 8 P.2d 271 (1932).

Claim by beneficiaries of decedent's contract to devise and bequeath is not claim against estate since claims within probate act include only obligations enforceable against decedent during his lifetime. *Ashbauth v. Davis*, 71 Idaho 150, 227 P.2d 954 (1951).

### **Claims of United States.**

Former section applied to the United States as claimant as well as to an individual, and failure of the United States to present its claim to administrator precluded it from successfully maintaining action thereon. *United States v. Hailey*, 2 Idaho (Hasb.) 22, 3 P. 263 (1882), appeal dismissed, 118 U.S. 233, 6 S. Ct. 1049, 30 L. Ed. 173 (1886).

### **Foreign Corporations.**

The published notice to creditors binds a foreign corporation authorized to transact business in Idaho to present its claim within the time limit for such purpose and its failure so to do, within that time, invoked the limitation against it. *American Sur. Co. v. Blake*, 45 Idaho 159, 261 P. 239 (1927); *Penn Mut. Life Ins. Co. v. Beauchamp*, 57 Idaho 530, 66 P.2d 1020 (1937).

### **Liens.**

Where plaintiff and her deceased husband borrowed money from a bank, and where the loan was evidenced by a note secured by a deed of trust, the bank, in an effort to recover on the note, was not required to file a claim against plaintiff's husband's estate as a trust deed is a form of lien and comes under this

section's exception regarding the enforcement of a mortgage or other lien upon estate property. *Lowry v. Ireland Bank*, 116 Idaho 708, 779 P.2d 22 (Ct. App. 1989).

### **Mortgages.**

Mortgage may be foreclosed without presenting it as claim against estate. *Swinehart v. Turner*, 38 Idaho 602, 224 P. 74 (1924); *First Nat'l Bank v. Commercial Union Assurance Co.*, 40 Idaho 236, 232 P. 899 (1925); *Berry v. Scott*, 43 Idaho 789, 255 P. 305 (1927).

A mortgagee seeking to establish a lien on the proceeds of an insurance policy need not present his claim to the administratrix before bringing suit. *First Nat'l Bank v. Commercial Union Assurance Co.*, 40 Idaho 236, 232 P. 899 (1925).

### **Payment of Claims.**

An executor or administrator has no authority to pay claims against the estate of which he has charge, except when they are presented within the time and in the manner required by law; if he pays in disregard of the requirements of the law, he may be required to make good to the estate all sums so illegally paid out. *Schneeberger v. Frazer*, 36 Idaho 737, 213 P. 568 (1923).

### **Partition.**

Owners of undivided two-thirds interest in real estate were not required to file a claim against the estate of deceased owner of an undivided one-third interest in order to secure partition, accounting and to determine moneys due plaintiffs for expenditures in payment of mortgage, taxes, repairs, and improvements. *Thurston v. Holden*, 45 Idaho 724, 265 P. 697 (1928).

### **Services.**

Where the claim of the administratrix for services rendered to decedent prior to death was submitted well beyond the allowable four month period, the administratrix' claim was correctly disallowed since it was untimely filed. *In re Estate of Lewis*, 97 Idaho 299, 543 P.2d 852 (1975).

### **Trusts.**

Action to recover trust fund from administrator of estate is not action upon claim against estate requiring presentation of claim. *Martin v. Smith*, 33 Idaho 692, 197 P. 823 (1921).

Oral trust against real estate of decedent does not have to be filed. *Ferrell v. McVey*, 71 Idaho 339, 232 P.2d 134 (1951).

### **Waiver of Defects.**

In action against executor on claim where creditor filed proper, timely claim and later, within the period for filing claims, mailed a "corrected statement" to the executor intending an amendment of the original claim, the

failure of the executor to seasonably raise an objection to the form of the "corrected statement" constituted a waiver of the right to rely

on the formal defects in rejecting the claim. *Lewiston Manor, Inc. v. Smith*, 94 Idaho 540, 493 P.2d 699 (1972).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 564 et seq., 1083.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 556 et seq.

**A.L.R.** — Tort claim as within nonclaim statutes. 22 A.L.R.3d 493.

Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff. 36 A.L.R.3d 693.

Validity of claims against estate filed prior to publication of notice to creditors. 70 A.L.R.3d 784.

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon. 17 A.L.R.4th 530.

### COMMENT TO OFFICIAL TEXT

There was some disagreement among the Reporters over whether a short period of limitations, or of non-claim, should be provided for claims arising at or after death. Subparagraph (b) was finally inserted because most felt it was desirable to accelerate the time when unadjudicated distributions would be final. The time limits stated would not, of course, affect any personal liability in contract, tort, or by statute, of the personal representative. Under Section 3-808 a personal representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Creditors of the estate and not of the personal representative thus face a special limitation that runs four months after performance is due from the personal representative. Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of subparagraph (d) [(e)]. If a personal representative is personally at fault in respect to a tort claim arising after the decedent's death, his personal liability would not be affected by the running of the special short period provided here.

In 1989, the Joint Editorial Board recommended amendments to Subsection (a). The change in (1) shortens the ultimate limitations period on claims against a decedent from 3 years after death to 1 year after death. Corresponding amendments were recommended for Sections 3-1003(a)(1) and 3-1006. The new one-year from death limitation (which applies without regard to whether or when an estate is opened for administration) is designed to prevent concerns stemming from the possible applicability to this Code of *Tulsa Professional Collection Services v. Pope*, 108 S. Ct. 1340, 485 U.S. 478 (1988) from unduly prolonging estate settlements and closings.

Subsection (a)(2), by reference to 3-801(a) and 3-801(b), adds an additional method of barring a prospective claimant of whom the personal representative is aware. The new bar is available when it is appropriate, under all of the circumstances, to send a mailed warning to one or more known claimants who have not presented claims that the recipient's claim will be barred if not presented within 60 days from the notice. This optional, mailed notice, described in accompanying new text in Section 3-801(b), is designed to enhance the ability of personal representatives to protect distributees against pass-through liability (under Section 3-1004) to possibly unbarred claimants. Personal representatives acting in the best interests of successors to the estate (see Section 3-703(a) and the definition of "successors" in Section 1-201(42) [(50)]) may determine that successors are willing to assume risks (i) that *Pope*, supra, will be held to apply to this Code in spite of absence of any significant contact between an agency of the state and the acts of a personal representative operating independently of Court supervision; and (ii) that a possibly unbarred claim is valid and will be pursued by its owner against estate distributees in time to avoid bar via the earliest to run of its own limitation period (which, under Section 3-802(b), resumes running four months after death), or the one-year [three-years] from death limitation now provided by § 3-803(a)(1). If publication of notice as provided in Section 3-801 has occurred and if *Pope* either is inapplicable to this Code or is applicable but the late-arising claim in question is judged to have been unknown to the personal representative and unlikely to have been discovered by reasonable effort, an earlier, four months from first publication bar will apply.

The Joint Editorial Board recognized that the new bar running one year after death [not adopted in Idaho] may be used by some sets of



successors to avoid payment of claims against their decedents of which they are aware. Successors who are willing to delay receipt and enjoyment of inheritances may consider waiting out the non-claim period running from death simply to avoid any public record of an administration that might alert known and unknown creditors to pursue their claims. The scenario was deemed to be unlikely, however, for unpaid creditors of a decedent are interested persons (Section 1-201(20) [(25)]) who are qualified to force the opening of an estate for purposes of presenting and enforcing claims. Further, successors who delay opening an administration will suffer from lack of proof of title to estate assets and attendant inability to enjoy their inheritances. Finally, the odds that holders of important claims against the decedent will need help in learning of the death and proper place of administration is rather small. Any benefit to such claimants of additional procedures designed to compel administrations and to locate and warn claimants of an impending non-claim bar, is quite likely to be heavily outweighed by the costs such procedures would impose on all estates, the vast majority of which are routinely applied to quick payment of the decedents' bills and distributed without any creditor controversy.

Note that the new bar [not adopted in Idaho] described by Section 3-801(b) and Section 3-803(a)(2) is the earlier of one year from death or the period described by reference to § 3-801(b) and § 3-801(a) in § 3-803(a)(2). If publication of notice is made under § 3-801(a), and the personal representative thereafter gives actual notice to a known creditor, when is the creditor barred? If the actual notice is given less than 60 days prior to the expiration of the four months from first publication period, the claim will not be barred four months after first publication because the actual notice given by § 3-801(b) advises the creditor that it has no less than 60 days to present the claim. It is as if the personal representative gave the claimant a written waiver of any benefit the estate may have had by reason of the four month bar following published notice. (c.f., the ability of a personal representative, under § 3-802 to change claims from allowed to disallowed, and vice versa, and the 60 day period given by § 3-806(a) within which a claimant may contest a disallowance). The period ending with the running of 60 days from actual notice replaces the four month from publication period as the "time for original presentation" referred to in Section 3-806(a).

Note, too, that if there is no publication of notice as provided in Section 3-801(a), the giving of actual notice to known creditors establishes separate, 60 days from time of notice, non-claim periods for those so notified. The failure to publish also means that no general non-claim period, other than the one year [three-years] period running from death, will be working for the estate. If an actual notice to a creditor is given before notice by publication is given, a question arises as to whether the 60 day period from actual notice, or the longer, four-month from publication applies. Subsections 3-801(a) and (b), which are pulled into Section 3-803(a)(2) by reference, make no distinction between actual notices given before publication and those given after publication. Hence, it would seem that the later time bar would control in either case. This reading also fits more satisfactorily with Section 3-806(a) and other code language referring in various contexts to "the time limit prescribed in § 3-803."

The proviso, formerly appended to 3-803(a)(1), regarding the effect in this state of the prior running of a non-claim statute of the decedent's domicile, has been restated as 3-803(b), and former subsections (b) and (c) have been redesignated as (c) and (d) [(e)]. The relocation of the proviso was made to improve the style of the section. No change of meaning is intended.

The second paragraph of the original comment has been deleted because of inconsistency with amended § 3-803(a).

The 1989 changes recommended by the Joint Editorial Board relating to former § 3-803(b) now designated as 3-803(c) are unrelated to the *Pope* case problem. The original text failed to describe a satisfactory non-claim period for claims arising at or after the decedent's death other than claims based on contract. The four months "after [any other claim] arises" period worked unjustly as to tort claims stemming from accidents causing the decedent's death by snuffing out claims too quickly, sometimes before an estate had been opened. The language added by the 1989 amendment assures such claimants against any bar working prior to the later of one year [three years] after death or four months from the time the claim arises.

The other change affecting what is now § 3-803(d) [(e)] is the addition of a third class of items which are not barred by any time bar running from death, publication of notice to creditors, or any actual notice given to an estate creditor. The addition resembles a modification to the Code as enacted in Arizona.

**15-3-804. Manner of presentation of claims.** — Claims against a decedent's estate may be presented as follows:



(a) The claimant shall deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, and file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the last to occur of: (1) delivery or mailing of the written statement of claim to the personal representative; or, (2) the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

(b) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death.

(c) If a claim is presented under subsection (a) of this section, no proceeding thereon may be commenced more than sixty (60) days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty (60) day period, or to avoid injustice the court, on petition, may order an extension of the sixty (60) day period, but in no event shall the extension run beyond the applicable statute of limitations. [I.C., § 15-3-804, as added by 1971, ch. 111, § 1, p. 233; am. 1992, ch. 240, § 1, p. 712; am. 2004, ch. 124, § 1, p. 415.]

## STATUTORY NOTES

**Cross References.** — Notice by resident creditor in cases of nonresident decedent, § 15-4-203.

## JUDICIAL DECISIONS

### ANALYSIS

Failure to object to claim.  
Interest.

### Failure to Object to Claim.

Where a party to an action based upon money owing under a sales contract died after the commencement of the suit, and where the opposing party, in a separate probate proceeding, filed upon decedent's estate a notice of claim regarding the contract action, the failure of decedent's estate to object to the claim did not give rise to a default judgment as, pursuant to subdivision (b) of this section, it is unnecessary to present in a probate proceed-

ing a notice of claim with regard to matters claimed in other judicial proceedings against the decedent and pending at the time of his death. *Blaser v. Cameron*, 116 Idaho 453, 776 P.2d 462 (Ct. App. 1989).

### Interest.

Under this section and §§ 15-3-803 (four months to file claim) and 15-3-806 (60 days from expiration of time to file claim), the interest on plaintiff hospital's claim could not

begin to accumulate until six months after the personal representative first published his notice to creditors. *Bingham Mem. Hosp. v. Boyd*, 134 Idaho 669, 8 P.3d 664 (Ct. App. 2000).

**Cited in:** *In re Reichert*, 95 Idaho 647, 516 P.2d 704 (1973); *State, Dept. of Health & Welfare v. Estate of Elliott* (*In re Estate of Elliott*), 141 Idaho 177, 108 P.3d 324 (2005).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Amendment of claim.  
 Authority of administrator.  
 Effect of presentation.  
 Procedure.  
 Sufficiency of claim.  
 Vacation of allowance.  
 Waiver of defects.

#### Amendment of Claim.

In probate proceedings if a claim against an estate is not presented to the administrator or executor in substantially the manner prescribed by law, and it is rejected, the claimant cannot, after he has commenced an action on such claim, amend the same to conform to the requirements of the statute relative to the presentation of claims in probate proceedings and, thereby, make it a valid presentation of the claim against the estate. *Flynn v. Driscoll*, 38 Idaho 545, 223 P. 524 (1924).

#### Authority of Administrator.

Administrator is without authority to pay claims against estate not presented in form and manner provided by law. *Schneeberger v. Frazer*, 36 Idaho 737, 213 P. 568 (1923).

#### Effect of Presentation.

Filing of claim, secured or unsecured, with administrator gives to claimant no right of action, but leaves selling of the property and payment of the debt in the discretion of administrator in the manner prescribed by law. *Kendrick State Bank v. Barnum*, 31 Idaho 562, 173 P. 1144 (1918).

#### Procedure.

When an application has been made by a creditor to present a claim against the estate of a decedent, supported by a proper affidavit, an order should be made permitting its presentation. If when presented it is rejected, an action may be commenced to establish the claim against the estate, and the executor or administrator may present any defense thereto he may have, including the statute of limitations. *Penn Mut. Life Ins. Co. v. Beauchamp*, 57 Idaho 530, 66 P.2d 1020 (1937).

#### Sufficiency of Claim.

A claim against an estate need not state all the facts with the precision required in a complaint, but all that is necessary is to indicate the nature and the amount of the

demand in a manner permitting the executor to act advisedly thereon. *Furst & Thomas v. Elliott*, 56 Idaho 491, 56 P.2d 1064 (1936).

A guarantee's claim against the estate of the guarantor, showing the amount of the principal's indebtedness and accompanied by a copy of the merchandising agreement, guaranty, and account is sufficient in form. *Furst & Thomas v. Elliott*, 56 Idaho 491, 56 P.2d 1064 (1936).

Claimant is not required to specify whether his claim against a decedent's estate is based on an express contract or a quantum meruit. *Hubbard v. Ball*, 59 Idaho 78, 81 P.2d 73 (1938).

The verification of a claim by the bookkeeper of the claimant is sufficient to justify allowance of credit to the executor for having paid the claim, in the absence of a showing that the estate suffered a loss by reason of payment, in spite of other statutory requirements. *Hubbard v. Ball*, 59 Idaho 78, 81 P.2d 73 (1938).

A claim against an estate may be required to be properly made out and presented to the court, so that the judge and all persons interested have notice of the nature of the claim and so that the legal representative of the estate is furnished sufficient information to enable him to properly investigate the claim before action is taken thereon. *Dowd v. Dowd*, 62 Idaho 157, 108 P.2d 287 (1940).

#### Vacation of Allowance.

Where claim against an estate has been allowed by judge, and thereafter objections and exceptions are filed by heir of such estate, judge has power and jurisdiction to set aside his former allowance of such claim and to hear and determine the objections and exceptions filed. Until the issue thus presented is heard, the matter is pending in such court. *In re Coryell's Estate*, 16 Idaho 201, 101 P. 723 (1909).

#### Waiver of Defects.

Where the sufficiency of plaintiff's claim was not challenged in the court below, and no

ground for rejection was stated when rejected by the executors, and where there was no request for clarification, and the formal sufficiency of the claim was not pleaded by the

executors in the district court, under such circumstances the formal insufficiency has been waived. *Carlson v. Estate of Carlson*, 93 Idaho 258, 460 P.2d 393 (1969).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 564 et seq., 1195, 1196.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 540 et seq.

**A.L.R.** — Amount of claim filed against decedent's estate as limiting amount recoverable in action against estate. 25 A.L.R.3d 1356.

### COMMENT TO OFFICIAL TEXT

The filing of a claim with the probate court under (2) [(b)] of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository

of the statement of claim, as is true of its responsibility for an inventory filed with it under Section 3-706.

In reading this section it is important to remember that a regular statute of limitation may run to bar a claim before the non-claim provisions run. See Section 3-802.

**15-3-805. Classification of claims.** — (a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

- (1) costs and expenses of administration;
- (2) reasonable funeral expenses;
- (3) debts and taxes with preference under federal law;
- (4) reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;
- (5) debts and taxes with preference under other laws of this state;
- (6) all other claims.

(b) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due. [I.C., § 15-3-805, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 13, p. 319.]

### JUDICIAL DECISIONS

#### ANALYSIS

Creditors.  
— In general.

#### Creditors.

##### — In General.

A judgment against the estate in favor of plaintiff hospital must only be paid in the due course of administering the estate and be subject to priority classification under this

section like all other creditor claims. Plaintiff hospital was not entitled to a direct money judgment against the estate to be paid before satisfaction of other debts with superior classification. *Bingham Mem. Hosp. v. Boyd*, 134 Idaho 669, 8 P.3d 664 (Ct. App. 2000).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Expenses of last illness.  
Mortgage claims.



**Expenses of Last Illness.**

Under a will which directed the executor to pay expenses of testator incurred by sickness, the executor was authorized to pay for nursing of testator during his last illness, notwithstanding absence of verified claim. *Hubbard v. Ball*, 59 Idaho 78, 81 P.2d 73 (1938).

In an action to quiet title to realty which had been conveyed by administratrix to the plaintiff, who was a creditor of the estate, at a private sale which had been regularly advertised and confirmed by an order of the court, judgment for the plaintiff, who paid for the land by being allowed credits for expenditures reasonably necessary in connection with the last illness of the decedent, was affirmed by a divided court. *Van Gilder v. Warfield's Unknown Heirs & Devises*, 63 Idaho 328, 120 P.2d 243 (1941).

**Mortgage Claims.**

Mortgagee can acquire no advantage or preference over other creditors by being allowed to present his claim and to, thereafter, foreclose his mortgage for amount remaining unpaid. *First Nat'l Bank v. Glenn*, 10 Idaho 224, 77 P. 623 (1904).

Where mortgagee presents his claim as unsecured, and administrator inadvertently includes him in a pro rata distribution of assets among creditors, and trial court directs that amount so paid mortgagee be refunded to administrator, mortgagee cannot be deemed to have participated in the general assets of the estate, and his measure of relief in action for foreclosure is limited to the security, all right to a deficiency judgment having been waived. *Kendrick State Bank v. Barnum*, 31 Idaho 562, 173 P. 1144 (1918).

**RESEARCH REFERENCES**

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 659 et seq., 674.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 621 et seq.

**COMMENT TO OFFICIAL TEXT**

In 1975, the Joint Editorial Board recommended the separation of funeral expenses from the items now accorded fourth priority.

Under federal law, funeral expenses, but not debts incurred by the decedent can be given priority over claims of the United States.

**15-3-806. Allowance of claims.** — (a) As to claims presented in the manner described in section 15-3-804(a) of this Part within the time limit prescribed in 15-3-803 of this Part, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty (60) days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his claim for sixty (60) days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

(b) Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the clerk of the court in due time and not barred by subsection (a) of this section. Notice in this proceeding shall be given to the claimant, the personal representative and those other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

(d) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty (60) days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision. [I.C., § 15-3-806, as added by 1971, ch. 111, § 1, p. 233; am. 1974, ch. 199, § 3, p. 1516.]

## JUDICIAL DECISIONS

### ANALYSIS

Hospital and funeral expenses.  
Interest.

#### Hospital and Funeral Expenses.

A judgment against the estate in favor of plaintiff hospital must only be paid in the due course of administering the estate and be subject to priority classification under § 15-3-805 like all other creditor claims. Plaintiff hospital was not entitled to a direct money judgment against the estate to be paid before satisfaction of other debts with superior classification. *Bingham Mem. Hosp. v. Boyd*, 134 Idaho 669, 8 P.3d 664 (Ct. App. 2000).

#### Interest.

Under this section and §§ 15-3-803 (four months to file claim) and 15-3-804 (presentation of claim), the interest on plaintiff hospital's claim could not begin to accumulate until six months after the personal representative first published his notice to creditors. *Bingham Mem. Hosp. v. Boyd*, 134 Idaho 669, 8 P.3d 664 (Ct. App. 2000).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Actions on claims.  
Admissions.  
Aid granted — Needy aged — Recovery from estate.  
Amendment of claim.  
Attorney's fees.  
"Claim" defined.  
Contract to devise.  
Counterclaim for moneys retained.  
Effect of allowance.  
Failure to direct payments.  
Hospital and funeral expenses.  
Implied approval.  
Judgments ex parte.  
Liability of fiduciary.  
Mortgage claims.  
Necessity of compliance before suit.  
Notice of rejection.  
Rejection of claim.  
Sufficiency of claim.  
Trusts.

#### Actions on Claims.

If claim of United States is rejected by administratrix, the United States can sue the administratrix in federal district court, even though state statute of limitations has run on the claim, since United States is not bound by

state statute of limitations or subject to defense of laches. *United States v. Gibson*, 101 F. Supp. 225 (D. Idaho 1951), rev'd on other grounds, 225 F.2d 807 (9th Cir. 1955).

Judgment rendered against executor or administrator upon a claim for money against



the estate of his testator or intestate only establishes claim in the same manner as if it had been allowed by executor or administrator, and judgment must be that executor or administrator pay in due course of administration amount ascertained to be due. *McElroy v. Whitney*, 24 Idaho 210, 133 P. 118 (1913).

It is not the duty of an administrator of an estate to file with the court claims against the estate which have been rejected by the administrator. *Chandler v. Probate Court*, 26 Idaho 173, 141 P. 635 (1914).

Refusal of executor to make a conveyance of real property to decedent's grantee, without the decree of court, does not create a right of action against estate in favor of grantee for money paid by latter on the purchase-price of the property, and a claim therefor is not a valid claim against estate. *Blake v. Lemp*, 32 Idaho 158, 179 P. 737 (1919).

Where an administrator is adversely claiming property which a creditor alleges belongs to the estate, and the creditor's claim against the estate has been rejected, the creditor may maintain an action against the administrator to account for such property and to recover judgment on his rejected claim. *Simonton v. Simonton*, 33 Idaho 255, 193 P. 386 (1920).

In action by cotenant to have money expended by him declared lien against share of his cotenant in property, his rights may be enforced although recourse against other property of his deceased cotenant is not waived in complaint, since lien of advancing tenant is limited to interest of his cotenant in common estate. *Thurston v. Holden*, 45 Idaho 724, 265 P. 697 (1928).

An action by an executor or administrator on a claim which he has filed against the estate and which has been rejected is against the estate, not against the judge, and hence the estate can appeal from a judgment for an administratrix on her claim. *Dowd v. Dowd*, 62 Idaho 157, 108 P.2d 287 (1940).

A party claiming an interest in an estate of a deceased person cannot present his claim and establish his status as such claimant in the first instance on appeal to the district court from a decree of a probate court distributing the estate. In *re Lincoln's Estate*, 79 Idaho 131, 312 P.2d 113 (1957).

### **Admissions.**

The admissions of an administrator, made in the partial allowance of a claim against the estate, will bind the estate. *Meinert v. Snow*, 3 Idaho 112, 27 P. 677 (1891).

### **Aid Granted — Needy Aged — Recovery from Estate.**

Since the statute granting aid to the needy aged does not fall within the constitutional inhibition against giving or loaning the credit of the state, the loan features of the Public

Assistance Law authorizing recovery from estates of needy aged persons is not unconstitutional. *State ex rel. Nielson v. Lindstrom*, 68 Idaho 226, 191 P.2d 1009 (1948).

### **Amendment of Claim.**

Time limitation for bringing of suit held not to apply where administratrix did not reject claim but requested its amendment. *Powell-Sanders Co. v. Carssow*, 28 Idaho 201, 152 P. 1067 (1915).

### **Attorney's Fees.**

An attorney's claim arising in the administration of an estate is not lost for the want of presentation and allowance. *Miller v. Monroe*, 50 Idaho 726, 300 P. 362 (1931).

### **"Claim" Defined.**

"Claim" includes only obligations enforceable against decedent during his lifetime. *Ashbauth v. Davis*, 71 Idaho 150, 227 P.2d 954 (1949).

### **Contract to Devise.**

Claim by beneficiaries of decedent's contract to devise and bequeath is not claim against estate such as to be required to be filed with executor or administrator. Thus, executor, or administrator is not necessary party unless property concerned is still in his hands. *Ashbauth v. Davis*, 71 Idaho 150, 227 P.2d 954 (1949).

### **Counterclaim for Moneys Retained.**

In action by surviving vendor, individually and as executrix of her late husband's estate, to terminate a written real estate contract and to quiet title to the property, purchaser's counterclaim for moneys retained as liquidated damages was not barred by not having been presented against the deceased husband's estate, having arisen subsequent to decedent's death and being an equitable action rather than a "claim." *Nichols v. Knowles*, 87 Idaho 550, 394 P.2d 630 (1964).

### **Effect of Allowance.**

Effect of allowance of claim is merely to rank claim among the acknowledged debts of the estate to be paid in due course of administration. In *re Coryell's Estate*, 16 Idaho 201, 101 P. 723 (1909).

It was not the intention of the former statute to make ex parte allowance a judgment, concluding the rights of the heirs. It is merely an acknowledgment of such claim against the estate. The heirs must not be denied an opportunity to contest the claim offering proof with reference to such claim. In *re Coryell's Estate*, 16 Idaho 201, 101 P. 723 (1909).

### **Failure to Direct Payments.**

Failure of a judgment against an executrix to direct her to pay the amount of the judgment "in due course of administration" of her



testator's estate does not render such judgment defective. *Frasier v. Carter*, 92 Idaho 79, 437 P.2d 32 (1968).

### **Hospital and Funeral Expenses.**

In an action for death by decedent's heirs, there can be no recovery on hospital and death disbursements by the heirs where the expenses were paid by another who recovered from the estate, as such claims are properly claims against the decedent's estate. *Hartman v. Gas Dome Oil Co.*, 50 Idaho 288, 295 P. 998 (1931).

### **Implied Approval.**

A decree of distribution approving a transaction whereby an administrator and his attorney received, in satisfaction of their claims against the estate, shares of stock, conclusively approved the claim of the attorney for services, notwithstanding that the claim was not approved by the judge and filed as required by statute. *Bruun v. Hanson*, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

### **Judgments Ex Parte.**

Action of both administrator and judge is ex parte. Judgment allowing such claim is an ex parte judgment. *In re Coryell's Estate*, 16 Idaho 201, 101 P. 723 (1909).

### **Liability of Fiduciary.**

An administrator or executor who pays debts of claimants in estate prior to paying claims of United States becomes personally liable for debt owed to the United States by virtue of provisions of U.S.C., title 31, §§ 191, 192 [new 31 U.S.C.S. § 3713]. *United States v. Gibson*, 101 F. Supp. 225 (D. Idaho 1951), rev'd on other grounds, 225 F.2d 807 (9th Cir. 1955).

### **Mortgage Claims.**

Former section did not preclude mortgagee from first presenting his claim for mortgage debt to administrator and afterward foreclosing his mortgage to obtain deficiency remaining after part-payment out of estate. *First Nat'l Bank v. Glenn*, 10 Idaho 224, 77 P. 623 (1904); *Weiser Loan & Trust Co. v. Comerford*, 41 Idaho 172, 238 P. 515 (1925); *Berry v. Scott*, 43 Idaho 789, 255 P. 305 (1927).

Where claim has been presented and allowed by administrator and holder still wishes to bring action to foreclose, he must waive recourse against other assets of the estate. *First Nat'l Bank v. Glenn*, 10 Idaho 224, 77 P. 623 (1904); *Weiser Loan & Trust Co. v. Comerford*, 41 Idaho 172, 238 P. 515 (1925).

When a claim upon a mortgage has been presented and rejected, foreclosure can be had without waiver of the right to a deficiency claim against the estate. *Weiser Loan & Trust Co. v. Comerford*, 41 Idaho 172, 238 P. 515 (1925).

At the death of a mortgagor, the mortgagee may either waive all recourse to a deficiency judgment and look to the security alone to pay the mortgage or he may present his claim to the executor or administrator and, if rejected, then bring action to foreclose without waiving recourse against other property of the estate for any deficiency. *Berry v. Scott*, 43 Idaho 789, 255 P. 305 (1927).

In rejecting a claim filed by a mortgagee, the administrator is but exercising the same right the deceased had in his lifetime, namely, that of requiring the mortgagee to resort first to the security. *Berry v. Scott*, 43 Idaho 789, 255 P. 305 (1927).

Mortgagee held not entitled to deficiency decree where foreclosure action was commenced eleven months after notice of rejection of claim by administrator. *Devereaux Mtg. Co. v. Huggins*, 46 Idaho 74, 266 P. 421 (1928).

The approval of an administrator's payments of interest on a mortgage indebtedness by the court and an order settling the final account and distributing the property subject to the mortgage, where the order was permitted to become final, was conclusive on the validity of the mortgage and could not be attacked on the ground that the note and mortgage were barred by the statute of limitations. *Horn v. Cornwall*, 65 Idaho 115, 139 P.2d 757 (1943).

### **Necessity of Compliance Before Suit.**

An action upon a rejected claim can be maintained only when the claim has been properly presented, followed by a rejection. *Flynn v. Driscoll*, 38 Idaho 545, 223 P. 524 (1924).

Party cannot maintain an action on a creditor's claim in district court unless the claim has first been presented to the executors in substantial compliance with the statute and rejected. *Carlson v. Estate of Carlson*, 93 Idaho 258, 460 P.2d 393 (1969).

### **Notice of Rejection.**

Notice of rejection of claim must be given to claimant or his agent or attorney personally or by mail. *Holt v. Mickelson*, 41 Idaho 694, 242 P. 977 (1925).

Mere fact that claimant knew informally that claim had been rejected cannot take place of statutory notice necessary to fix rights of parties. *Holt v. Mickelson*, 41 Idaho 694, 242 P. 977 (1925).

Former statute contemplated notice of rejection served by administratrix upon claimant or his agent or attorney. *Devereaux Mtg. Co. v. Huggins*, 46 Idaho 74, 266 P. 421 (1928).

In notice of rejection given by attorney for personal representative, it is not necessary that he sign as attorney for such representative. *Devereaux Mtg. Co. v. Huggins*, 46 Idaho 74, 266 P. 421 (1928).

Giving of notice of rejection is ministerial and not judicial act which may be delegated by representative to attorney. *Devereaux Mtg. Co. v. Huggins*, 46 Idaho 74, 266 P. 421 (1928).

#### Rejection of Claim.

Claims allowed by administrator or executor must be presented to probate court for approval, but claims rejected do not require submission to probate court. *United States v. Gibson*, 101 F. Supp. 225 (D. Idaho 1951), *rev'd* on other grounds, 225 F.2d 807 (9th Cir. 1955).

An executor cannot waive any provision of the statute affecting the substantial rights of creditors or heirs of an estate, and a claim founded upon a written contract, not accompanied by a copy of the contract, should be rejected. *Flynn v. Driscoll*, 38 Idaho 545, 223 P. 524 (1924).

Mere failure of executor or administrator to act upon claim within prescribed time does not amount to disallowance of claim. *Wormward v. Brown*, 50 Idaho 125, 294 P. 331 (1930).

#### Sufficiency of Claim.

Evidence of claimant failed to show an agreement by deceased to pay a reasonable

amount to invent and construct device. *Nelson v. Bruce*, 51 Idaho 378, 6 P.2d 140 (1931).

Claim was legally sufficient where claim showed it was for wages for a designated period, amount due, and was definite enough to bar any other claim for the same wages. *Nagele v. Miller*, 72 Idaho 24, 236 P.2d 722 (1951).

A claim in an estate does not have to follow any particular form, as long as it indicates the nature and amount in such a manner as to permit the executor or administrator to pass upon same. *Nagele v. Miller*, 72 Idaho 24, 236 P.2d 722 (1951).

#### Trusts.

A cestui que trust is not entitled to a preference lien upon the assets of the estate of the trustee on the ground that the estate was indirectly increased as a result of the dissipation of the trust fund. *Martin v. Smith*, 33 Idaho 692, 197 P. 823 (1921).

Recovery may be had in an action to recover a trust fund against the administrator of deceased's estate, although a claim had not been filed with the administrator, since the trust fund was not a part of the deceased's estate. *Kite v. Eckley*, 48 Idaho 454, 282 P. 868 (1929).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 630 et seq., 645 et seq., 687, 707, 710.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 642 et seq.

**15-3-807. Payment of claims.** — (a) Upon the expiration of the earlier of the time limitations provided in section 15-3-803, Idaho Code, for the presentation of claims, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed, after making provision for homestead, family and support allowances, for claims already presented that have not yet been allowed or whose allowance has been appealed, and for unbarred claims that may yet be presented, including costs and expenses of administration. By petition to the court in a proceeding for the purpose, or by appropriate motion if the administration is supervised, a claimant whose claim has been duly allowed but not paid may secure an order directing the personal representative to pay the claim to the extent funds of the estate are available to pay it.

(b) The personal representative at any time may pay any just claim that has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by its payment if:

(1) payment was made before the expiration of the time limit stated in subsection (a) of this section and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or



(2) payment was made, due to negligence or wilful fault of the personal representative, in such manner as to deprive the injured claimant of priority. [I.C., § 15-3-807, as added by 1971, ch. 111, § 1, p. 233; am. 1991, ch. 87, § 5, p. 192.]

### STATUTORY NOTES

**Cross References.** — Power to avoid transfers, § 15-3-710.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 630 et seq., 649 et seq., 1189.

**C.J.S.** — 34 C.J.S. Executors and Administrators, § 621 et seq.

### COMMENT TO OFFICIAL TEXT

As recommended for amendment in 1989 by the Joint Editorial Board, the section directs the personal representative to pay allowed claims at the earlier of one year [three years] from death or the expiration of 4 months from first publication. This interpretation reflects that distribution need not be delayed further on account of creditors' claims once a time bar running from death or publication has run, for known creditors who have failed to present claims by such time may have re-

ceived an actual notice leading to a bar 60 days thereafter and in any event can and should be the occasion for withholding or the making of other provision by the personal representative to cover the possibility of later presentation and allowance of such claims. Distribution would also be appropriate whenever competent and solvent distributees expressly agree to indemnify the estate for any claims remaining unbarred and undischarged after the distribution.

#### **15-3-808. Individual liability of personal representative. —**

(a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding. [I.C., § 15-3-808, as added by 1971, ch. 111, § 1, p. 233.]



JUDICIAL DECISIONS

Claims Against Estate.

Claims may be made against an estate for obligations arising from control of the estate by the personal representative during admin-

istration; liability for an attorney fee award is such an obligation. *Kunzler v. Kunzler*, 109 Idaho 350, 707 P.2d 461 (Ct. App. 1985).

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 398 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 286, 297, 298, 306 et seq., 316 et seq., 345 et seq., 348 et seq., 351 et seq., 369, 395, 419, 439, 458, 630, 648, 674 et seq.

**A.L.R.** — Liability of executor, administrator, trustee, or his counsel, for interest, penalty, or extra taxes assessed against estate because of tax law violations. 47 A.L.R.3d 507.

Liability of estate for torts of executor, administrator, or trustee. 82 A.L.R.3d 892.

COMMENT TO OFFICIAL TEXT

In the absence of statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e. g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the estate only after exhausting his remedies against

the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

**15-3-809. Secured claims.** — Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:

(a) If the creditor exhausts his security before receiving payment, unless precluded by other law upon the amount of the claim allowed less the fair value of the security; or

(b) If the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation. [I.C., § 15-3-809, as added by 1971, ch. 111, § 1, p. 233.]

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

Mortgage Lien.

Fact that mortgagee files his claim against decedent's estate as an unsecured claim does

not, ipso facto, operate as waiver of his mortgage lien. *Kendrick State Bank v. Barnum*, 31 Idaho 562, 173 P. 1144 (1918).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 585, 675.

**A.L.R.** — Right of heir or devisee to have

realty exonerated from lien thereon at expense of personal estate. 4 A.L.R.3d 1023.

**15-3-810. Claims not due and contingent or unliquidated claims.**

— (a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

(1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;

(2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise. [I.C., § 15-3-810, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 578, 579, 676.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 522, 552.

**A.L.R.** — Unliquidated claim for damages

arising out of tort as a contingent claim within statute relating to presentation of claims against decedent's estate or action to enforce the same after rejection. 22 A.L.R.3d 493.

**15-3-811. Counterclaims.** — In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate a court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim. [I.C., § 15-3-811, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 648.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 577.

**15-3-812. Execution and levies prohibited.** — No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages,

pledges or liens upon real or personal property in an appropriate proceeding. [I.C., § 15-3-812, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 30 Am. Jur. 2d, Executions, § 156.  
 31 Am. Jur. 2d, Executors and Administrators, § 1234 et seq.  
**C.J.S.** — 33 C.J.S., Executions, § 54 et seq.

**A.L.R.** — Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure. 27 A.L.R.3d 863.

**15-3-813. Compromise of claims.** — When a claim against the estate has been presented in any manner, the personal representative may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated. [I.C., § 15-3-813, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 617-619.

**15-3-814. Encumbered assets.** — If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration. [I.C., § 15-3-814, as added by 1971, ch. 111, § 1, p. 233; am. 1978, ch. 350, § 13, p. 914.]

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 612, 675.

**C.J.S.** — 34 C.J.S., Executors and Administrators, §§ 371 et seq., 439.

COMMENT TO OFFICIAL TEXT

Section 2-609 establishes a rule of construction against exoneration. Thus, unless the will indicates to the contrary, a specific devise of mortgaged property takes subject to the lien without right to have other assets applied to discharge the secured obligation.  
 In 1975, the Joint Editorial Board recommended substitution of the word "presented",

in the first sentence, for the word "filed" in the original text. The change aligns this section with Section 3-804, which describes several methods, including mailing or delivery to the personal representative, as methods of protecting a claim against non-claim provisions of the Code.

**15-3-815. Administration in more than one state — Duty of personal representative.** — (a) All assets of estates being administered in this state are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed.



(b) If the estate either in this state or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges and claims, after satisfaction of the exemptions, allowances and charges, each claimant whose claim has been allowed either in this state or elsewhere in administrations of which the personal representative is aware, is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this state, the creditor so benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(c) In case the family exemptions and allowances, prior charges and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this state is not the state of the decedent's last domicile, the claims allowed in this state shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this state the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this state is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions. [I.C., § 15-3-815, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1082.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1098 et seq.

#### COMMENT TO OFFICIAL TEXT

Under Section 3-803(a) (1), if a local (property only) administration is commenced and proceeds to advertisement for claims before non-claim statutes have run at domicile, claimants may prove claims in the local administration at any time before the local non-claim period expires. Section 3-815 has the effect of subjecting all assets of the decedent,

wherever they may be located and administered, to claims properly presented in any local administration. It is necessary, however, that the personal representative of any portion of the estate be aware of other administrations in order for him to become responsible for claims and charges established against other administrations.

**15-3-816. Final distribution to domiciliary representative.** — The estate of a non-resident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless (1) by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this state without reference to the local law of the decedent's domicile; (2) the personal representative of this state, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or (3) the court orders otherwise in a proceeding for a closing order under section 15-3-1001 of this code or incident to the closing of a supervised

administration. In other cases, distribution of the estate of a decedent shall be made in accordance with the other Parts of this chapter. [I.C., § 15-3-816, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 960.

**15-3-817. Community estates.** — If a community estate is administered as if each decedent survived the other because of application of the simultaneous death act, section 15-2-104 and section 15-2-601 of this code, or the provisions of a will, community debts will be charged ratably to each half of the community estate and separate debts to the estate of the decedent by whom they were incurred. [I.C., § 15-3-817, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

RESEARCH REFERENCES

**Am. Jur.** — 15A Am. Jur. 2d, Community Property, § 115 et seq.

PART 9. SPECIAL PROVISIONS RELATING TO DISTRIBUTION

**15-3-901. Successors' rights if no administration.** — In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by homestead allowance, exemption or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption. [I.C., § 15-3-901, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 921, 922.  
**A.L.R.** — Abandonment, desertion, or refusal to support on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 A.L.R.3d 446.

Adultery on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 A.L.R.3d 486.

### COMMENT TO OFFICIAL TEXT

Title to a decedent's property passes to his heirs and devisees at the time of his death. See Section 3-101. This section adds little to

Section 3-101 except to indicate how successors may establish record title in the absence of administration.

**15-3-902. Distribution — Order in which assets appropriated — Abatement.** — (a) Except as provided in subsection (b) and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order: (1) property not disposed of by the will; (2) residuary devisees; (3) general devisees; (4) specific devisees. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(b) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a) of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) If an estate of a decedent consists partly of separate property and partly of community property, community debts shall be charged to community property and separate debts to separate property. Expenses of administration shall be apportioned and charged against the different kinds of property in proportion to the relative value thereof, except that none of such expenses shall be apportioned or charged to the survivor's share of the community property.

(d) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets. [I.C., § 15-3-902, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### Effect of Failure to Appeal.

A decree of distribution of probate court becomes conclusive as to the rights of all heirs and claimants to the estate if not appealed

from within the time provided by law. *Connolly v. Probate Court*, 25 Idaho 35, 136 P. 205 (1913).



## RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1485 et seq.

**C.J.S.** — 96 C.J.S., Wills, § 1719 et seq.

31 Am. Jur. 2d, Executors and Administrators, § 924 et seq.

## COMMENT TO OFFICIAL TEXT

A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section express rules which may be regarded as approximating what testators generally want. The statutory order of abatement is designed to aid in resolving doubts concerning the intention of a particular testator, rather than to defeat his purpose. Hence, subsection (b) directs that

consideration be given to the purpose of a testator. This may be revealed in many ways. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies.

**15-3-903. Right of retainer.** — The amount of a non-contingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt. [I.C., § 15-3-903, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 927.

**C.J.S.** — 26A C.J.S., Descent and Distribution, § 133.

**15-3-904. Interest on general pecuniary devise.** — General pecuniary devises bear interest at the legal rate beginning one (1) year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will. [I.C., § 15-3-904, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**C.J.S.** — 97 C.J.S., Wills, § 2002 et seq.

**A.L.R.** — Bequest of bank deposits, stocks, bonds, notes, or other securities as carrying

dividends or interest accruing between testator's death and payment of legacy. 15 A.L.R.3d 1038.

## COMMENT TO OFFICIAL TEXT

Unlike the common law, this section provides that a general pecuniary devisee's right to interest begins one year from the time when administration was commenced, rather than one year from death. The rule provided here is similar to the common law rule in that the right to interest for delayed payment does

not depend on whether the estate in fact realized income during the period of delay. The section is consistent with Section 5(b) of the Revised Uniform Principal and Income Act which allocates realized net income of an estate between various categories of successors.

**15-3-905. Penalty clause for contest.** — A provision in a will purporting to penalize any interested person for contesting the will or instituting

other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings. [I.C., § 15-3-905, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1334 et seq.

**C.J.S.** — 96 C.J.S., Wills, § 1390.

**A.L.R.** — Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary. 23 A.L.R.4th 369.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary. 3 A.L.R.5th 590.

### **15-3-906. Distribution in kind — Valuation — Method. —**

(a) Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:

(1) A specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in section 15-2-403 of this code shall receive the items selected.

(2) Any homestead or family allowance or devise payable in money may be satisfied by value in kind provided:

(A) the person entitled to the payment has not demanded payment in cash;

(B) the property distributed in kind is valued at fair market value as of the date of its distribution, and

(C) no residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(3) For the purpose of valuation under paragraph (2) securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than thirty (30) days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(4) The residuary estate shall be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. In other cases, residuary property may be converted into cash for distribution.

(b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any

distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within thirty (30) days after mailing or delivery of the proposal. [I.C., § 15-3-906, as added by 1971, ch. 111, § 1, p. 233; am. 2001, ch. 294, § 8, p. 1036.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Conveyance by heir before distribution.  
Correction of decree.  
Rights of grantee of heir.

#### Conveyance by Heir Before Distribution.

An heir may convey his interest in real property of the estate to a third party before a final decree of distribution, and if such conveyance is uncontested, distribution may be made to the assignee. *Bruun v. Hanson*, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

The order of a court ordering distribution of a share of an estate to an heir's transferee does not adjudicate the validity of title between the heir and the transferee, since the court has no jurisdiction to determine that question, but the legal effect of the order is merely to protect the administrator as against a charge of wrongful distribution. *Bruun v. Hanson*, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

#### Correction of Decree.

The court may, when obvious mistakes and inconsistencies appearing upon the face of a final decree of distribution are properly called to its attention, reopen the estate to correct such errors. In *re Blackinton's Estate*, 29 Idaho 310, 158 P. 492 (1916).

#### Rights of Grantee of Heir.

Claimant contending as grantee of heir, being neither heir, devisee, nor creditor, cannot be heard to question procedure of distribution. In *re Blackinton's Estate*, 29 Idaho 310, 158 P. 492 (1916).

If validity of conveyance from heir is disputed, court must distribute as though no conveyance was made. Grantee has his remedy in proper tribunal. In *re Blackinton's Estate*, 29 Idaho 310, 158 P. 492 (1916).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 945, 946, 953 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 661.

### COMMENT TO OFFICIAL TEXT

This section establishes a preference for distribution in kind. It directs a personal representative to make distribution in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so. It provides a reasonable means for

determining value of assets distributed in kind. It is implicit in Sections 3-101, 3-901 and this section that each residuary beneficiary's basic right is to his proportionate share of each asset constituting the residue.

**15-3-907. Distribution in kind — Evidence.** — If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee



as evidence of the distributee's title to the property. [I.C., § 15-3-907, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 955.

#### COMMENT TO OFFICIAL TEXT

This and sections following should be read with Section 3-709 which permits the personal representative to leave certain assets of a decedent's estate in the possession of the person presumptively entitled thereto. The "release" contemplated by this section would be used as evidence that the personal representative had determined that he would not need to disturb the possession of an heir or devisee for purposes of administration.

Under Section 3-711, a personal representative's relationship to assets of the estate is

described as the "same power over the title to property of the estate as an absolute owner would have." A personal representative may, however, acquire a full title to estate assets, as in the case where particular items are conveyed to the personal representative by sellers, transfer agents or others. The language of Section 3-907 is designed to cover instances where the instrument of distribution operates as a transfer, as well as those in which its operation is more like a release.

**15-3-907A. Deceased beneficiary as heir.** — (a) If the decedent has left a surviving child or children or issue of children among the persons who are by law entitled to succeed to his estate, and any of them, before the close of administration, has died before reaching the age of eighteen (18) and not having married, no administration of such deceased issue's estate is necessary, but all the estate which such deceased issue is entitled to receive by inheritance must, without administration, be distributed to the heirs at law of the deceased issue.

(b) If any other heir, legatee, or devisee shall die after the decedent's death and before distribution, property to which he might be entitled shall be distributed to the representative of his estate or directly to his heirs, legatees or devisees or the persons entitled thereto. [I.C., § 15-3-907A, as added by 1971, ch. 111, § 1, p. 233.]

**15-3-908. Distribution — Right or title of distributee.** — Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper. [I.C., § 15-3-908, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 25, 956.

COMMENT TO OFFICIAL TEXT

The purpose of this section is to channel controversies which may arise among successors of a decedent because of improper distributions through the personal representative who made the distribution, or a successor personal representative. Section 3-108 does

not bar appointment proceedings initiated to secure appointment of a personal representative to correct an erroneous distribution made by a prior representative. But see Section 3-1006.

**15-3-909. Improper distribution — Liability of distributee. —**

Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him. [I.C., § 15-3-909, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d., Executors and Administrators, §§ 25, 27, 962 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 665 et seq.

COMMENT TO OFFICIAL TEXT

The term “improperly” as used in this section must be read in light of Section 3-703 and the manifest purpose of this and other sections of the Code to shift questions concerning the propriety of various distributions from the fiduciary to the distributees in order to prevent every administration from becoming an adjudicated matter. Thus, a distribution may be “authorized at the time” as contemplated by Section 3-703, and still be “improper” under this section. Section 3-703 is designed to permit a personal representative to distribute without risk in some cases, even though there has been no adjudication. When an unadjudicated distribution has occurred, the rights of persons to show that the basis for the distribution (e. g., an informally probated

will, or informally issued letters of administration) is incorrect, or that the basis was improperly applied (erroneous interpretation, for example) is preserved against distributees by this section.

The definition of “distributee” to include the trustee and beneficiary of a testamentary trust in 1-201(10) [(14)] is important in allocating liabilities that may arise under Sections 3-909 and 3-910 on improper distribution by the personal representative under an informally probated will. The provisions of 3-909 and 3-910 are based on the theory that liability follows the property and the fiduciary is absolved from liability by reliance upon the informally probated will.

**15-3-910. Purchasers from distributees protected. —**

If property distributed in kind or a security interest therein is acquired for value by a purchaser from, or lender to, a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order and whether or not the authority of the personal representative was terminated prior to execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal

representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or his transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated prior to the distribution. Any recorded instrument described in this section shall be prima facie evidence that such transfer was made for value. [I.C., § 15-3-910, as added by 1971, ch. 111, § 1, p. 233; am. 1978, ch. 350, § 14, p. 914.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 25, 968, 969.

#### COMMENT TO OFFICIAL TEXT

The words “instrument or deed of distribution” are explained in Section 3-907. The effect of this section may be to make an instrument or deed of distribution a very desirable link in a chain of title involving succession of land. Cf. Section 3-901.

In 1975, the Joint Editorial Board recommended additions that strengthen the protec-

tion extended by this section to bona fide purchasers from distributees. The additional language was derived from recommendations evolved with respect to the Colorado version of the Code by probate and title authorities who agreed on language to relieve title assurers of doubts they had identified in relation to some cases.

**15-3-911. Partition for purpose of distribution.** — When two (2) or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one (1) or more of the heirs or devisees may petition the court prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the court shall partition the property in the same manner as provided by the law for civil actions of partition. The court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party. [I.C., § 15-3-911, as added by 1971, ch. 111, § 1, p. 233.]

#### JUDICIAL DECISIONS

**Cited in:** *Kunzler v. First Interstate Bank*, 108 Idaho 374, 699 P.2d 1388 (1985).

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 957.

**A.L.R.** — Right to partition of overriding

royalty interest in oil and gas leasehold. 58 A.L.R.3d 1052.



## COMMENT TO OFFICIAL TEXT

Ordinarily heirs or devisees desiring partition of a decedent's property will resolve the issue by agreement without resort to the courts. (See Section 3-912). If court determi-

nation is necessary, the court with jurisdiction to administer the estate has jurisdiction to partition the property.

**15-3-912. Private agreements among successors to decedent binding on personal representative.** — Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedent's [decedents'] estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts. [I.C., § 15-3-912, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The bracketed word "decedents'" was inserted by the compiler for clarity.

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 48 et seq.

**A.L.R.** — Family settlement of testator's estate. 29 A.L.R.3d 8.

Family settlement of intestate estate. 29 A.L.R.3d 174.

## COMMENT TO OFFICIAL TEXT

It may be asserted that this section is only a restatement of the obvious and should be omitted. Its purpose, however, is to make it clear that the successors to an estate have residual control over the way it is to be distributed. Hence, they may compel a personal representative to administer and distribute as they may agree and direct. Successors should compare the consequences and possible advantages of careful use of the power to renounce as described by Section 2-801 with the effect of agreement under this section. The most obvious difference is that an agreement among successors under this sec-

tion would involve transfers by some participants to the extent it changed the pattern of distribution from that otherwise applicable.

Differing from a pattern that is familiar in many states, this Code does not subject testamentary trusts and trustees to special statutory provisions, or supervisory jurisdiction. A testamentary trustee is treated as a devisee with special duties which are of no particular concern to the personal representative. Article VII [Chapter 7] contains optional procedures extending the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.

**15-3-913. Distributions to trustee.** — (a) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in section 15-7-303 of this code.

(b) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the court has acted.

(c) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (a) and (b) of this section. [I.C., § 15-3-913, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 958.

**A.L.R.** — "Pour-over" provisions from will to inter vivos trust. 12 A.L.R.3d 56.

Construction and operation of will or trust provision appointing advisors to trustee or executor. 56 A.L.R.3d 1249.

Amount of attorneys' compensation in proceedings involving wills and administration of

decedents' estates. 58 A.L.R.3d 317.

Liability of testamentary trustee for failure to assert claim against executor of testator's estate for mistake resulting in overpayment of taxes. 68 A.L.R.3d 1265.

Exercise by will of trustor's reserved power to revoke or modify inter vivos trust. 81 A.L.R.3d 959.

### COMMENT TO OFFICIAL TEXT

This section is concerned with the fiduciary responsibility of the executor to beneficiaries of trusts to which he may deliver. Normally, the trustee represents beneficiaries in matters involving third persons, including prior fiduciaries. Yet, the executor may apprehend that delivery to the trustee may involve risks for the safety of the fund and for him. For example, he may be anxious to see that there is no equivocation about the devisee's willingness to accept the trust, and no problem of preserving evidence of the acceptance. He may have doubts about the integrity of the trustee, or about his ability to function satisfactorily. The testator's selection of the trustee may have been based on facts which are still current, or which are of doubtful relevance at the time of distribution. If the risks relate to the question of the trustee's intention to handle the fund without profit for himself, a conflict of interest problem is involved. If the risk relates to the ability of the

trustee to manage prudently, a more troublesome question is posed for the executor. Is he, as executor, not bound to act in the best interests of the beneficiaries?

In many instances involving doubts of this sort, the executor probably will want the protection of a Court order. Sections 3-1001 and 3-1002 provide ample authority for an appropriate proceeding in the Court which issued the executor's letters.

In other cases, however, the executor may believe that he may be adequately protected if the acceptance of the trust by the devisee is unequivocal, or if the trustee is bonded. The purpose of this section is to make it clear that it is proper for the executor to require the trustee to register the trust and to notify beneficiaries before receiving distribution. Also, the section complements Section 7-304 by providing that the personal representative may petition an appropriate court to require that the trustee be bonded.



**Status of testamentary trustees under the Uniform Probation Code.**

Under the Uniform Probate Code, the testamentary trustee by construction would be considered a devisee, distributee, and successor to whom title passes at time of the testator's death even though the will must be probated to prove the transfer. The informally probated will is conclusive until set aside and the personal representative may distribute to the trustee under the informally probated will or settlement agreement and the title of the trustee as distributee represented by the instrument or deed of distribution is conclusive until set aside on showing that it is improper. Should the informally probated will be set aside or the distribution to the trustee be shown to be improper, the trustee as distributee would be liable for value received but purchasers for value from the trustee as distributee under an instrument of distribution would be protected. Section 1-201's definition of "distributee" limits the distributee liability of the trustee and substitutes that of the trust beneficiaries to the extent of distributions by the trustee.

As a distributee as defined by 1-201, the testamentary trustee or beneficiary of a tes-

tamentary trust is liable to claimants like other distributees, would have the right of contribution from other distributees of the decedent's estate and would be protected by the same time limitations as other distributees (3-1006).

Incident to his standing as a distributee of the decedent's estate, the testamentary trustee would be an interested party who could petition for an order of complete settlement by the personal representative or for an order terminating testate administration. He also could appropriately receive the personal representative's account and distribution under a closing statement. As distributee he could represent his beneficiaries in compromise settlements in the decedent's estate which would be binding upon him and his beneficiaries. See Section 3-912.

The general fiduciary responsibilities of the testamentary trustee are not altered by the Uniform Probate Code and the trustee continues to have the duty to collect and reduce to possession within a reasonable time the assets of the trust estate including the enforcement of any claims on behalf of the trust against prior fiduciaries, including the personal representative, and third parties.

**15-3-914. Disposition of unclaimed assets.** — If an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his trustee if one has been appointed; or, if no trustee has been appointed, shall file the report of abandoned property required by section 14-517, Idaho Code, and proceed to dispose of the property in the manner set forth in the "unclaimed property act," provided, however, that in the event no person appears to claim such property within one thousand eight hundred twenty-seven (1,827) days, approximately five (5) years, from the date of the appointment of the personal representative, the moneys or property so deposited shall accrue and be transferred to the public school permanent endowment fund created pursuant to section 4, article IX, of the constitution of the state of Idaho. [I.C., § 15-3-914, as added by 1971, ch. 111, § 1, p. 233; am. 1980, ch. 281, § 4, p. 730; am. 1984, ch. 36, § 5, p. 60; am. 1992, ch. 21, § 8, p. 67; am. 2007, ch. 97, § 4, p. 280.]

**STATUTORY NOTES**

**Cross References.** — Public school endowment fund, § 33-902.

Unclaimed property act, § 14-501 et seq.

**Amendments.** — The 2007 amendment, by ch. 97, substituted "shall accrue and be transferred to the public school permanent endowment fund created pursuant to section 4, article IX, of the constitution of the state of

Idaho" for "shall accrue and be set over to the general account" at the end.

**Effective Dates.** — Section 5 of S.L. 1980, ch. 281 declared an emergency. Approved March 31, 1980.

Section 9 of S.L. 1992, ch. 21 declared an emergency. Approved March 9, 1992.



## RESEARCH REFERENCES

**Am. Jur.** — 27A Am. Jur. 2d, Escheat, § 961.  
**C.J.S.** — 30A C.J.S., Escheat, § 1 et seq.  
 31 Am. Jur. 2d, Executors and Administrators, § 1061.

## COMMENT TO OFFICIAL TEXT

This section applies when it is believed that a claimant, heir or distributee exists but he cannot be located. See § 2-105.

**15-3-915. Distribution to person under disability.** — A personal representative may discharge his obligation to distribute to any person under legal disability by distributing to his conservator, or any other person authorized by this code or otherwise to give a valid receipt and discharge for the distribution. [I.C., § 15-3-915, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 959.  
**A.L.R.** — Factors considered in making election for incompetent to take under or against will. 3 A.L.R.3d 6.  
 Time within which election must be made for incompetent to take under or against will. 3 A.L.R.3d 119.  
 Who may make election for incompetent to take under or against will. 21 A.L.R.3d 320.

## COMMENT TO OFFICIAL TEXT

Section 5-103 is especially important as a possible source of authority for a valid discharge for payment or distribution made on behalf of a minor.

**15-3-916. Apportionment of estate taxes. [Repealed.]**

## STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 15-3-916, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 14, p. 510; am. 1999, ch. 105, § 1, p. 330; am. 2001, ch. 262, § 1, p. 961, was repealed by S.L. 2004, ch. 54, § 1. See now § 15-3-1301 et seq.

## PART 10. CLOSING ESTATES

**15-3-1001. Formal proceedings terminating administration — Testate or intestate — Order of general protection.** — (a) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one (1) year from the appointment of the original personal representative except that no petition under this section may be entertained until the time for presenting

claims which arose prior to the death of the decedent has expired. The petition may request the court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

(b) If one (1) or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact. [I.C., § 15-3-1001, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Cross References.** — Devisee must survive testator by 120 hours, § 15-2-601.      Limitation on presentation of claims, § 15-3-803.  
Heir must survive decedent by 120 hours, § 15-2-104.

JUDICIAL DECISIONS

**Failure to Give Notice.**

Where the personal representative on an estate, who had been informally appointed by the probate court, attempted to formally close the estate pursuant to this section, his failure to send notice to all interested persons as required by § 15-1-401 could not be excused by some of those parties having actual or constructive notice, since constructive notice

is insufficient under the sections and the allegations of actual notice were conjectural in nature. *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

**Cited in:** *In re Estate of Irwin*, 99 Idaho 543, 585 P.2d 953 (1978); *Spencer v. Idaho First Nat'l Bank*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

DECISIONS UNDER PRIOR LAW

ANALYSIS

- Appeal.
- Collateral attack.
- Death of foreign legatee.
- Decree in foreign state.
- Duty to advise as to heirs.
- Effect of decree.
- Heirs not joining in appeal.

Invalid will.

Jurisdiction of federal court.

Jurisdiction of probate court.

### **Appeal.**

Appeals from orders approving a final account and entering a decree of distribution are not the exclusive remedy; but the court may set aside such orders made on an advanced date of settlement where the date was improperly advanced without notice to interested parties. *Simons v. Davenport*, 66 Idaho 400, 160 P.2d 464 (1945).

### **Collateral Attack.**

In suit by remainderman to recover proportionate share of proceeds of sale of right of way to state by co-remaindermen based on decree of distribution in estate, the defendants were not misled merely because copy of will was attached to complaint since decree could not be attacked in collateral proceeding. *Woodland v. Spillman*, 75 Idaho 286, 271 P.2d 819 (1954).

### **Death of Foreign Legatee.**

Bequests to residents of France by an Idaho testator (such legatees having died intestate during the pendency of the administration of the testator's estate) were distributable to the heirs of such deceased legatees under the laws of France. *Barthel v. Johnston*, 92 Idaho 84, 437 P.2d 366 (1968).

### **Decree in Foreign State.**

Decree in foreign state is conclusive only as to determination of each heir's share, and not as to contracts between heirs or between heirs and third parties. *Blake v. Blake*, 69 Idaho 214, 205 P.2d 495 (1949).

### **Duty to Advise as to Heirs.**

An administrator or executor has the duty to advise the probate court as to all known heirs of the decedent prior to distribution in the estate. *Gerlach v. Schultz*, 72 Idaho 507, 244 P.2d 1095 (1952).

### **Effect of Decree.**

Decree of distribution is a final judgment and decree to extent of determining that all the interest that the estate had in certain property shall pass and be distributed to the heirs of deceased. It determines who are the heirs and their respective shares and interests in the estate, but it is not a decree affecting or adjudicating title to the property as between the estate or heirs to the estate and any third party. *Miller v. Mitcham*, 21 Idaho 741, 123 P. 941 (1912); *White v. Smith*, 43 Idaho 354, 253 P. 849 (1926).

If nothing appears on the face of a decree of distribution to show the lack of jurisdiction, the decree is prima facie evidence of title. *Jorgensen v. McAllister*, 34 Idaho 186, 202 P. 1059 (1921).

A court order settling the final account of an executor, administrator or guardian is a judgment in rem, final and conclusive against all the world after the time for appeal has expired. *Short v. Thompson*, 56 Idaho 361, 55 P.2d 163 (1936); *Horn v. Cornwall*, 65 Idaho 115, 139 P.2d 757 (1943).

### **Heirs Not Joining in Appeal.**

A probate court decree approving the administrator's account and ordering distribution reversed upon appeal by one heir because of error in adjudicating alleged advancements is not binding upon the heirs who did not join in the appeal, but must be retried as to all. *Hirning v. Webb*, 91 Idaho 229, 419 P.2d 671 (1966).

### **Invalid Will.**

Under a will declared invalid, the retiring executrix may be required to make a final account which should be passed upon by the court. In *re Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

Under a will subsequently declared invalid, the property possessed by the executrix to be included in the final account may be passed upon by the court. In *re Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 64 Idaho 651, 135 P.2d 299 (1943).

### **Jurisdiction of Federal Court.**

Federal court did not have jurisdiction or proceeding to determine heirship under a will and quiet title to property since proceeding was one for the construction of the will and jurisdiction of such a proceeding was vested exclusively in the probate courts of the state. *White v. White*, 126 F. Supp. 924 (D. Idaho 1954).

### **Jurisdiction of Probate Court.**

The probate court had in its jurisdiction to settle title to realty where question involved was whether property was community between decedent and administratrix or separate and to determine to whom it should descend, no strangers being involved in such matter but only rival claimants to heirship. *Lundy v. Lundy*, 79 Idaho 185, 312 P.2d 1028 (1957).



RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 900, 906 et seq., 960, 1189.  
**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1034 et seq.

**A.L.R.** — Duty and liability of executor with respect to locating and noticing legatees, devisees, or heirs. 10 A.L.R.3d 547.

COMMENT TO OFFICIAL TEXT

Subsection (b) is derived from § 64(b) of the Illinois Probate Act (1967) [S.H.A. ch. 3, § 64(b)]. Section 3-106 specifies that an order is binding as to all who are given notice even though less than all interested persons were notified. This section provides a method of curing an oversight in regard to notice which may come to light before the estate is finally settled. If the person who failed to receive

notice of the earlier proceeding succeeds in obtaining entry of a different order from that previously made, others who received notice of the earlier proceeding may be benefitted. Still, they are not entitled to notice of the curative proceeding, nor should they be permitted to appear.  
 See also, Comment following Section 3-1002.

**15-3-1002. Formal proceedings terminating testate administration — Order construing will without adjudicating testacy.** — A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one (1) year, from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of section 15-3-1001 of this Part. [I.C., § 15-3-1002, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 20, 906 et seq.

COMMENT TO OFFICIAL TEXT

Section 3-1002 permits a final determination of the rights between each other and against the personal representative of the devisees under a will when there has been no formal proceeding in regard to testacy. Hence,

the heirs in intestacy need not be made parties. Section 3-1001 permits a final determination of the rights between each other and against the personal representative of all persons interested in an estate. If supervised

administration is used, Section 3-505 directs that the estate be closed by use of procedures like those described in 3-1001. Of course,

testacy will have been adjudicated before time for the closing proceeding if supervised administration is used.

**15-3-1003. Closing estates — By sworn statement of personal representative.** — (a) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than six (6) months after the date of original appointment of a general personal representative for the estate, a verified statement stating that he, or a previous personal representative whom he has succeeded, has or have:

(1) determined that the time limitation for presentation of creditors' claims has expired;

(2) fully administered the estate of the decedent by making payment, settlement or other disposition of all claims that were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement must state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or state in detail other arrangements that have been made to accommodate outstanding liabilities; and

(3) sent a copy thereof to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected thereby.

(b) If no proceedings involving the personal representative are pending in the court one (1) year after the closing statement is filed, the appointment of the personal representative terminates. [I.C., § 15-3-1003, as added by 1971, ch. 111, § 1, p. 233; am. 1991, ch. 87, § 6, p. 192.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 20, 640 et seq., 906 et seq.

#### COMMENT TO OFFICIAL TEXT

The Code uses "termination" to refer to events which end a personal representative's authority. See Sections 3-608, et seq. The word "closing" refers to circumstances which support the conclusions that the affairs of the estate either are, or have been alleged to have been, wound up. If the affairs of the personal representative are reviewed and adjudicated

under either Sections 3-1001 or 3-1002, the judicial conclusion that the estate is wound up serves also to terminate the personal representative's authority. See Section 3-610(b). On the other hand, a "closing" statement under 3-1003 is only an affirmation by the personal representative that he believes the affairs of the estate to be completed. The

statement is significant because it reflects that assets have been distributed. Any creditor whose claim has not been barred and who has not been paid is permitted by Section 3-1004 to assert his claim against distributees. The personal representative is also still fully subject to suit under Sections 3-602 and 3-608, for his authority is not "terminated" under Section 3-610(a) until one year after a closing statement is filed. Even if his authority is "terminated," he remains liable to suit unless protected by limitation or unless an adjudication settling his accounts is the reason for "termination". See Sections 3-1005 and 3-608.

From a slightly different viewpoint, a personal representative may obtain a complete discharge of his fiduciary obligations through a judicial proceeding after notice. Sections 3-1001 and 3-1002 describe two proceedings which enable a personal representative to gain protection from all persons or from devisees only. A personal representative who neither obtains a judicial order of protection nor files a closing statement, is protected by 3-703 in regard to acts or distributions which were authorized when done but which become doubtful thereafter because of a change in

testacy status. On the other questions, the personal representative who does not take any of the steps described by the Code to gain more protection has no protection against later claims of breach of his fiduciary obligation other than any arising from consent or waiver of individual distributees who may have bound themselves by receipts given to the personal representative.

This section increases the prospects of full discharge of a personal representative who uses the closing statement route over those of a personal representative who relies on receipts. Full protection follows from the running of the six months limitations period described in 3-1005. But, 3-1005's protection does not prevent distributees from claiming lack of full disclosure. Hence, it offers little more protection than a receipt. Still, it may be useful to decrease the likelihood of later claim of non-disclosure. Its more significant function, however, is to provide a means for terminating the office of personal representative in a way that will be obvious to third persons.

In 1989 the Joint Editorial Board recommended changing subparagraph (a)(1) to make the time reference correspond to changes recommended for Section 3-803.

**15-3-1004. Liability of distributees to claimants.** — After assets of an estate have been distributed and subject to section 15-3-1006 of this Part, an undischarged claim not barred may be prosecuted in a proceeding against one (1) or more distributees. No distributee shall be liable to claimants for amounts received as exempt property, homestead or family allowances, or for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees. [I.C., § 15-3-1004, as added by 1971, ch. 111, § 1, p. 233; am. 1978, ch. 350, § 15, p. 914.]

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### Action by Ward.

A former ward may maintain an equitable action for an accounting against the heirs, devisees, and donees of the deceased surety of the deceased guardian and to have the prop-

erty acquired by the defendants from the surety without consideration surcharged with the guardian's debt. *Madison v. Buhl*, 51 Idaho 564, 8 P.2d 271 (1932).



## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 640, 908, 970.

**C.J.S.** — 97 C.J.S., Wills, § 1955 et seq.

## COMMENT TO OFFICIAL TEXT

This section creates a ceiling on the liability of a distributee of “the value of his distribution” as of the time of distribution. The section indicates that each distributee is liable for all that a claimant may prove to be due, provided the claim does not exceed the value of the defendant’s distribution from the estate. But, each distributee may preserve a right of contribution against other distributees. The risk of insolvency of one or more, but less than all distributees, is on the distributee rather than on the claimant.

In 1975, the Joint Editorial Board recommended the addition, after “claimants for amounts” in the second sentence, of “received as exempt property, homestead or family allowances, or for amounts ...” The purpose of the addition was to prevent unpaid creditors of a decedent from attempting to enforce their claims against a spouse or child who had received a distribution of exempt values.

**15-3-1005. Limitations on proceedings against personal representative.** — Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within six (6) months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent’s estate. [I.C., § 15-3-1005, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

## ANALYSIS

Final resolution of estate tax liability.

Fraud by personal representative.

**Final Resolution of Estate Tax Liability.**

Personal representative of estate acted reasonably in negotiating with the IRS and in delaying distribution of the estate until a final resolution of the estate’s tax liability was made. *Allen v. Shea*, 105 Idaho 31, 665 P.2d 1041 (1983).

**Fraud by Personal Representative.**

Where the final formal closing of an estate took place in November 1975, an action com-

menced in May 1976 which alleged fraud by the personal representatives was not barred by the 6-month limitation contained in this section since this section applies only to informally closed estates and does not apply when fraud, misrepresentation and inadequate disclosure are alleged. *Cahoon v. Seaton*, 102 Idaho 542, 633 P.2d 607 (1981).

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 971, 1188 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 897 et seq.

## COMMENT TO OFFICIAL TEXT

This and the preceding section make it clear that a claimant whose claim has not been barred may have alternate remedies when an estate has been distributed subject to his claim. Under this section, he has six months to prosecute an action against the personal representative if the latter breached any duty to the claimant. For example, the personal representative may be liable to a creditor if he violated the provisions of Section 3-807. The preceding section describes

the fundamental liability of the distributees to unbarred claimants to the extent of the value received. The last sentence emphasizes that a personal representative who fails to disclose matters relevant to his liability in his closing statement and in the account of administration he furnished to distributees, gains no protection from the period described here. A personal representative may, however, use Section 3-1001, or, where appropriate, 3-1002 to secure greater protection.

**15-3-1006. Limitations on actions and proceedings against distributees.** — Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of (i) three (3) years after the decedent's death; or (ii) one (1) year after the time of distribution thereof, except if the claim is by a creditor of the decedent, it is forever barred two (2) years after the decedent's death. This section does not bar an action to recover property or value received as the result of fraud, or an action commenced by the state tax commission to collect state taxes. [I.C., § 15-3-1006, as added by 1971, ch. 111, § 1, p. 233; am. 1991, ch. 87, § 7, p. 192; am. 1997, ch. 113, § 3, p. 274.]

## STATUTORY NOTES

**Cross References.** — \*State tax commission, art. VII, § 12, Idaho Const. and § 63-101.

## RESEARCH REFERENCES

**Am. Jur.** — 80 Am. Jur. 2d, Wills, § 1493 et seq.

31 Am. Jur. 2d, Executors and Administrators, § 970 et seq.

**C.J.S.** — 97 C.J.S., Wills, § 1613 et seq.

## COMMENT TO OFFICIAL TEXT

This section describes an ultimate time limit for recovery by creditors, heirs and devisees of a decedent from distributees. It is to be noted: (1) Section 3-108 imposes a general limit of three years from death on one who must set aside an informal probate in order to establish his rights, or who must secure probate of a late-discovered will after an estate has been administered as intestate. Hence the time limit of 3-108 may bar one who would claim as an heir or devisee sooner than this section, although it would never cause a bar

prior to three years from the decedent's death. (2) This section would not bar recovery by a supposed decedent whose estate has been probated. See Section 3-412. (3) The limitation of this section ends the possibility of appointment of a personal representative to correct an erroneous distribution as mentioned in Sections 3-1005 and 3-1008. If there have been no adjudications under Section 3-409, or possibly 3-1001 or 3-1002, estate of the decedent which is discovered after administration has been closed may be the subject of

different distribution than that attending the estate originally administered.

The last sentence excepting actions or suits to recover property kept from one by the fraud of another may be unnecessary in view of the blanket provision concerning fraud in Article I [Chapter 1]. See Section 1-106.

In 1989, the Joint Editorial Board recommended changing the section so as to separate proceedings involving claims by claimants barred one year after decedent's death by Section 3-803(a)(1), and other proceedings by unbarred claimants or by omitted heirs or devisees.

**15-3-1007. Certificate discharging liens securing fiduciary performance.** — After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the registrar that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety. [I.C., § 15-3-1007, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 907.

#### COMMENT TO OFFICIAL TEXT

This section does not affect the liability of the personal representative, or of any surety, but merely permits a release of security given by a personal representative, or his surety,

when, from the passage of time and other conditions, it seems highly unlikely that there will be any liability remaining undischarged. See Section 3-607.

**15-3-1008. Subsequent administration.** — If other property of the estate is discovered after an estate has been settled and the personal representative discharged or after one (1) year after a closing statement has been filed, the court upon petition of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the court orders otherwise, the provisions of this code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration. [I.C., § 15-3-1008, as added by 1971, ch. 111, § 1, p. 233.]

#### JUDICIAL DECISIONS

##### DECISIONS UNDER PRIOR LAW

##### Application.

Where certain property belonging to deceased was not administered in probate proceedings, and fact was not discovered until final decree of distribution had been entered,

final decree should not for this reason be set aside on application of creditor or party interested. *Chandler v. Probate Court*, 26 Idaho 173, 141 P. 635 (1914).



## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1018 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1036.

## COMMENT TO OFFICIAL TEXT

This section is consistent with Section 3-108 which provides a general period of limitations of three years from death for appoint-

ment proceedings, but makes appropriate exception for subsequent administrations.

**15-3-1009. Decree of distribution to attorney general.** — Whenever any estate involves, or may involve, a charitable trust, the court shall at the time of distribution of said estate forward to the attorney general of the state of Idaho a certified copy of said decree of distribution of the estate which involves or may involve said charitable trust. [I.C., § 15-3-1009, as added by 1972, ch. 201, § 15, p. 510.]

## PART 11. COMPROMISE OF CONTROVERSIES

**15-3-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.** — A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probated will, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may effect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it. [I.C., § 15-3-1101, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 82, 617.

80 Am. Jur. 2d, Wills, § 970.

**C.J.S.** — 15A C.J.S., Compromise and Settlement, § 1 et seq.

33 C.J.S., Executors and Administrators, § 266 et seq.

**A.L.R.** — Family settlement of testator's estate. 29 A.L.R.3d 8.

Family settlement of intestate estate. 29 A.L.R.3d 174.

Effect of settlement with and acceptance of release from one wrongful death beneficiary upon liability of tortfeasor to other beneficiaries or decedent's personal representative. 21 A.L.R.4th 275.

**15-3-1102. Procedure for securing court approval of compromise.** — The procedure for securing court approval of a compromise is as follows:

(a) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any

person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(b) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(c) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement. [I.C., § 15-3-1102, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 82.

#### COMMENT TO OFFICIAL TEXT

This section and the one preceding it outline a procedure which may be initiated by competent parties having beneficial interests in a decedent's estate as a means of resolving controversy concerning the estate. If all competent persons with beneficial interests or claims which might be affected by the proposal and parents properly representing interests of their children concur, a settlement scheme differing from that otherwise governing the devolution may be substituted. The procedure for securing representation of minors and unknown or missing persons with interests must be followed. See Section 1-403. The ultimate control of the question of whether the substitute proposal shall be accepted is with the court which must find: "that the contest or controversy is in good faith and that the effect of the agreement upon the interests of parties represented by fiduciaries is just and reasonable."

The thrust of the procedure is to put the authority for initiating settlement proposals with the persons who have beneficial interests in the estate, and to prevent executors and testamentary trustees from vetoing any such proposal. The only reason for approving

a scheme of devolution which differs from that framed by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation. Because executors and trustees may have an interest in fees and commissions which they might earn through efforts to carry out testator's intention, the judgment of the court is substituted for that of such fiduciaries in appropriate cases. A controversy which the court may find to be in good faith, as well as concurrence of all beneficially interested and competent persons and parent-representatives provide prerequisites which should prevent the procedure from being abused. Thus, the procedure does not threaten the planning of a testator who plans and drafts with sufficient clarity and completeness to eliminate the possibility of good faith controversy concerning the meaning and legality of his plan.

See Section 1-403 for rules governing representatives and appointment of guardians ad litem.

These sections are modeled after Section 93 of the Model Probate Code. Comparable legislative provisions have proved quite useful in Michigan. See M.C.L.A. §§ 702.45 — 702.49.

PART 12. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY  
ADMINISTRATION PROCEDURE FOR SMALL ESTATES

**15-3-1201. Collection of personal property by affidavit. —**

(a) Thirty (30) days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person or entity claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(1) The fair market value of the entire estate of the decedent which is subject to probate, wherever located, less liens and encumbrances, does not exceed one hundred thousand dollars (\$100,000);

(2) Thirty (30) days have elapsed since the death of the decedent;

(3) No application or petition for the appointment of a personal representative or for summary administration is pending or has been granted in any jurisdiction; and

(4) The claiming successor is entitled to payment or delivery of the property, including entitlement as a trust pursuant to a will of the decedent.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (a) of this section.

(c) For the purposes of this section, for the recovery of medical assistance, the department of health and welfare shall be deemed a successor to the estate provided:

(1) Prior to the presentation of the affidavit, the department shall give notice, by regular mail, to any person known to the department to be an heir, successor or creditor of the estate, and the department shall certify such notice in writing to the person described in subsection (a) of this section.

(2) Within sixty (60) days of mailing the notice, any person who claims the right to reimbursement for priority estate expenses, as permitted by section 15-3-805(a)(1) through (4), Idaho Code, may submit a written demand for payment of such expenses, together with any documentation of the expenses, to the department. Upon receipt of the funds, and up to the amount received, the department shall pay priority claims which it determines would be allowed in a probate proceeding, if any. The department shall notify each claimant of the disposition of his claim. The provisions of chapter 52, title 67, Idaho Code, shall apply to determinations made by the department under this section. [I.C., § 15-3-1201, as added by 1971, ch. 111, § 1, p. 233; am. 1993, ch. 253, § 1, p. 878; am. 1995, ch. 167, § 1, p. 650; am. 1997, ch. 212, § 1, p. 631; am. 2002, ch. 216, § 1, p. 594; am. 2006, ch. 160, § 1, p. ]; am. 2006, ch. 179, § 1, p. 553.]



### STATUTORY NOTES

**Cross References.** — Department of health and welfare, § 56-1001 et seq.

**Amendments.** — This section was amended by two 2006 acts which appear to be compatible and have been compiled together. The 2006 amendment, by ch. 160, substi-

tuted “one hundred thousand dollars (\$100,000)” for “seventy-five thousand dollars (\$75,000)” in subsection (a)(1).

The 2006 amendment, by ch. 179, added subsection (c).

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 16, 17.

### COMMENT TO OFFICIAL TEXT

#### [General comment to §§ 15-3-1201 — 15-3-1204.]

The four sections which follow include two designed to facilitate transfer of small estates without use of a personal representative and two designed to simplify the duties of a personal representative, who is appointed to handle a small estate.

The Flexible System of Administration described by earlier portions of Article III [Chapter 3] lends itself well to situations involving small estates. Letters may be obtained quickly without notice or judicial involvement. Immediately, the personal representative is in a position to distribute to successors whose deeds or transfers will protect purchasers. This route accommodates the need for quick and inexpensive transfers of land of small value as well as other assets. Consequently, it was unnecessary to frame complex provisions extending the affidavit procedures to land.

Indeed, transfers via letters of administration may prove to be less troublesome than use of the affidavit procedure. Still, it seemed desirable to provide a quick collection mechanism which avoids all necessity to visit the probate court. For one thing, unpredictable local variations in probate practice may produce situations where the alternative proce-

dure will be very useful. For another, the provision of alternatives is in line with the overall philosophy of Article III [Chapter 3] to provide maximum flexibility.

Figures gleaned from a recent authoritative report of a major survey of probated estates in Cleveland, Ohio, demonstrate that more than one-half of all estates in probate had a gross value of less than \$15,000. This means that the principal measure of the relevance of any legislation dealing with probate procedures is to be found in its impact on very small and moderate sized estates. Here is the area where probate affects most people.

#### [Comment to § 15-3-1201.]

This section provides for an easy method for collecting the personal property of a decedent by affidavit prior to any formal disposition. Existing legislation generally permits the surviving widow or children to collect wages and other small amounts of liquid funds. Section 3-1201 goes further in that it allows the collection of personal property as well as money and permits any devisee or heir to make the collection. Since the appointment of a personal representative may be obtained easily under the Code, it is unnecessary to make the provisions regarding small estates applicable to realty.

**15-3-1202. Effect of affidavit.** — The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and account-

able therefor to any personal representative of the estate or to any other person having a superior right. [I.C., § 15-3-1202, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 16-18.

### COMMENT TO OFFICIAL TEXT

Sections 3-1201 and 3-1202 apply to any personal property located in this state whether or not the decedent died domiciled in this state, to any successor to personal property located in this state whether or not a

resident of this state, and, to the extent that the laws of this state may control the succession to personal property, to personal property wherever located of a decedent who died domiciled in this state.

**15-3-1203. Small estates — Summary administrative procedure.** — If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in section 15-3-1204 of this Part. [I.C., § 15-3-1203, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 16, 19<sup>\*</sup>, 20, 641.

### COMMENT TO OFFICIAL TEXT

This section makes it possible for the personal representative to make a summary distribution of a small estate without the necessity of giving notice to creditors. Since the

probate estate of many decedents will not exceed the amount specified in the statute, this section will prove useful in many estates.

**15-3-1204. Small estates — Closing by sworn statement of personal representative.** — (a) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of section 15-3-1203 of this Part by filing with the court, at any time after disbursement and distribution of the estate, a verified statement that:

- (1) to the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable, necessary medical and hospital expenses of the last illness of the decedent;

(2) the personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and

(3) the personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

(b) If no actions or proceedings involving the personal representative are pending in the court one (1) year after the closing statement is filed, the appointment of the personal representative terminates.

(c) A closing statement filed under this section has the same effect as one filed under section 15-3-1003 of this code. [I.C., § 15-3-1204, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, §§ 16, 20.

### COMMENT TO OFFICIAL TEXT

The personal representative may elect to close the estate under Section 3-1002 in order to secure the greater protection offered by that procedure.

The remedies for fraudulent statement provided in Section 1-106 of course would apply to any intentional misstatements by a personal representative.

**15-3-1205. Summary administration of estates in which a surviving spouse is the sole beneficiary.** — (a) Upon the testate or intestate death of a person leaving a surviving spouse as the sole devisee or beneficiary, the surviving spouse (or any person claiming title to any property through or under such surviving spouse) may file a verified petition setting out marriage and the death of a person leaving a surviving spouse as the sole devisee or heir. If the decedent died testate, the petition must be accompanied by the original of the last will and testament of the decedent. Notice of hearing shall be given pursuant to the provisions of section 15-1-401, Idaho Code.

(b) If it shall appear at such hearing that the decedent and the person claimed to be the surviving spouse were duly married and that the surviving spouse is the sole heir or devisee, a decree shall be made to that effect. This decree shall thereafter have the same effect as a formal decree approving or determining distribution. The petitioner, or the surviving spouse, or both, need not appear in person at such hearing, nor must an attorney for the petitioner spouse appear in person at such hearing. The petitioner or the attorney for the petitioner, or both, may either:

(1) Upon proper motion made by the petitioner, appear telephonically; or



(2) Submit one (1) or more affidavits in advance of the hearing certifying that notice of hearing was given as required by law and that no objection to the entering of the decree has been received by the petitioner or the attorney for the petitioner.

(c) In the event that the surviving spouse (or person claiming through or under the surviving spouse) shall elect to proceed under this section, the surviving spouse shall assume and be liable for any and all indebtedness that might be a claim against the estate of the decedent and there will be no administration of the estate of the decedent. [I.C., § 15-3-1205, as added by 1973, ch. 124, § 2, p. 234; am. 1974, ch. 199, § 4, p. 1516; am. 2003, ch. 60, § 1, p. 206; am. 2005, ch. 121, § 1, p. 396.]

### STATUTORY NOTES

**Prior Laws.** — Former section 15-3-1205, comprising S.L. 1972, ch. 122, § 1, p. 241, was repealed by S.L. 1973, ch. 124, § 1, p. 234.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

### PART 13. UNIFORM ESTATE TAX APPORTIONMENT

**15-3-1301. Short title.** — This part may be cited as the “Uniform Estate Tax Apportionment Act.” [I.C., § 15-3-1301, as added by 2004, ch. 54, § 2, p. 246.]

**15-3-1302. Definitions.** — As use in this part:

(a) “Apportionable estate” means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned reduced by:

- (1) Any claim or expense allowable as a deduction for purposes of the tax;
- (2) The value of any interest in property that, for purposes of the tax, qualifies for a marital or charitable deduction or otherwise is deductible or is exempt; and
- (3) Any amount added to the decedent's gross estate because of a gift tax on transfers made before death.

(b) “Estate tax” means a federal, state, or foreign tax, however denominated, imposed because of the death of an individual and interest and penalties associated with the tax. The term does not include an inheritance tax, income tax, or generation-skipping transfer tax other than a generation-skipping transfer tax incurred on a direct skip taking effect at death.

(c) “Gross estate” means, with respect to an estate tax, all interests in property subject to the tax.

(d) “Person” has the same meaning set forth in section 15-1-201(33) [(34)], Idaho Code.

(e) “Ratable” means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied. “Ratably” has a corresponding meaning.

(f) “Time-limited interest” means an interest in property which terminates on a lapse of time or on the occurrence or nonoccurrence of an event or which is subject to the exercise of discretion that could transfer a beneficial interest to another person. The term does not include a cotenancy unless the cotenancy itself is a time-limited interest.

(g) "Value" means, with respect to an interest in property, fair market value as finally determined for purposes of the estate tax that is to be apportioned, reduced by any outstanding debt secured by the interest without reduction:

(1) For taxes paid or required to be paid; or

(2) For any special valuation adjustment. [I.C., § 15-3-1302, as added by 2004, ch. 54, § 2, p. 246.]

### STATUTORY NOTES

**Compiler's Notes.** — The bracketed insertion in paragraph (d) was added by the compiler to correct the statutory reference.

### OFFICIAL COMMENT

The starting point for calculating the apportionable estate is the value of the gross estate. Since the properties included and deductions allowed for determining different taxes can differ, the apportionable estate figure may not be the same for different taxes.

Property not included in the apportionable estate for an estate tax typically will not bear any of that tax. However, the donee recipients of such property will bear part of an estate tax to the extent that the available assets of the apportionable estate are insufficient to pay the tax. See Sections 6(c) and 9(b). Since deductible transfers will not generate any estate tax, it is appropriate to insulate those transfers from the allocation of that tax to the extent that properties of the apportionable estate are sufficient.

A gift tax paid by the decedent on a gift that was made by the decedent or the decedent's spouse within three years of the decedent's death is added back to the decedent's gross estate for federal estate tax purposes by Internal Revenue Code §2035(b). A State or foreign estate tax may have a similar provision or effect. Subparagraph (1)(C) excludes any such gift tax from the apportionable estate.

The value of the apportionable estate is reduced by claims and expenditures that are allowable estate tax deductions whether or not allowed. For example, administrative expenses that could have been claimed as estate tax deductions, but instead are taken as income tax deductions, will reduce the apportionable estate. When a decedent's estate includes property in more than one State, the apportionable estate for each State's estate tax will be reduced by the expenses and claims that are deductible for purposes of that tax. Where an expenditure cannot be identified as pertaining to property in the gross estate of only one State tax, the expenditure is to be apportioned ratably among the taxes

of the States in which the relevant properties are located, in accordance with the values of those properties.

A spouse's elective share of a decedent's estate is excluded from the apportionable estate to the extent that the spouse's share qualifies for an estate tax deduction. Other statutory claims against a decedent's estate that do not qualify for an estate tax deduction (for example, a pretermitted heir) do not reduce the apportionable estate.

The term "estate tax" is defined in the Act to include all estate taxes and certain generation-skipping taxes arising because of an individual's death. The term estate tax does not include any inheritance taxes, income taxes, gift taxes, or generation-skipping taxes incurred because of a taxable termination, a taxable distribution, or an inter vivos direct skip. A generation-skipping tax that is incurred because of a direct skip that takes place because of the decedent's death is included in the term "estate tax."

Currently, no United States income tax is imposed on the unrealized appreciation of a decedent's assets at the time of death. While Canada and some other foreign countries impose an income tax at death, those income taxes are not apportioned by the Act.

Some States impose an inheritance tax on recipients of property from a decedent. This Act does not apportion those taxes.

This Act does not provide for the apportionment of the income tax payable on the receipt of Income in Respect of a Decedent (IRD). If a decedent held an installment obligation the payment on which is accelerated by the decedent's death, the income tax incurred thereby is not apportioned by the Act.

If a donor pays a gift tax during the donor's life, the amount paid will not be part of the donor's assets when the donor dies; and so the gift tax will not be subject to apportionment among the persons interested in the donor's



gross estate. This consequence is consistent with the typical donor's wish that the gifts made during life pass to the donee free of any transfer tax. If all or part of a gift tax was not paid at the time of the donor's death and is subsequently paid by the donor's personal representative, the burden of the gift tax should lie with the same persons who would have borne it if the donor had paid it during life, typically, the residuary beneficiaries. A gift tax liability is not apportioned by this Act, but is treated the same as any other debt of the estate. A gift tax deficiency that becomes due after the decedent's death also is treated as a debt of the decedent's estate.

The kinds of death benefits included in a gross estate depend upon the particular estate tax to be apportioned and may not be the same for each tax. For example, some State death taxes will have an exemption for a homestead; some will exclude life insurance proceeds and pensions. In determining the gross estate for such taxes, the property excluded from the tax will also be excluded from the gross estate for that tax. Property that is deductible under an estate tax, such as property that qualifies for a marital or charitable deduction, is nevertheless "subject to" that tax and included in the gross estate. Once the value of the gross estate for an estate tax is determined, the reductions described in Paragraph (1) are applied to ascertain the apportionable estate.

A "time-limited interest" includes a term of years, a life interest, a life income interest, an annuity interest, an interest that is subject to a power of transfer, a unitrust interest, and similar interests, whether present or future, and whether held alone or in cotenancy. The fact that an interest that otherwise is not a time-limited interest is held in cotenancy does not make it a time-limited interest.

If a debt is secured by more than one interest in property, the value of each such interest is the fair market value of that interest less a ratable portion of the debt that it secures.

If the beneficiary of an interest in property is required by the terms of the transfer to make a payment to a third party or to pay a liability of the transferor, that obligation constitutes an encumbrance on the property, but does not necessarily reduce the value of the apportionable estate. If the obligation is to make a transfer or payment to a third party, other than an obligation to satisfy a debt of the decedent based on money or money worth's consideration, the right of the third person constitutes an interest in the apportionable estate and so is subject to apportionment.

A decedent's direction by will or other dispositive instrument that property controlled by that instrument is to be used to pay

a debt secured by an interest in property is an additional bequest to the person who is to receive the interest securing the debt.

Taxes imposed on the transfer or receipt of property, regardless of whether a lien on the property or payable by the recipient of the property, do not reduce the value of the property for purposes of apportioning estate taxes by this Act.

The date on which gross estate property is to be valued for federal estate tax purposes (and for some other estate tax purposes) is either the date of the decedent's death or an alternate valuation date elected by the decedent's personal representative pursuant to the estate tax law. An estate tax value that is determined on the alternate valuation date is not, as such, a "special valuation adjustment." A "special valuation adjustment" refers to a reduction of the valuation of an item included in the gross estate pursuant to a provision of the estate tax law. See the Comment to Section 7.

If a person has a right by contract or by the decedent's will or other dispositive instrument to purchase gross estate property at a price below its estate tax value, the estate tax value of the property is the amount included in the value of the decedent's gross estate. The difference or discount between the purchase price and the estate tax value of the property can be viewed as an interest which the decedent passed to that person. If the right to purchase is exercised, the amount of the discount is the value of that person's interest in the apportionable estate.

The value of a person's interest in the apportionable estate can depend upon the value of the apportionable estate. So, the value of a residuary interest in a decedent's estate will reflect the amount of allowable deductions which, under this Act, reduce the apportionable estate, but will not be reduced by expenditures that are not allowable deductions for that estate tax. The formula for allocating estate taxes in Section 4(1) utilizes a fraction of which the numerator is the value of a person's interest in the apportionable estate rather than the value of the person's interest in the net estate or in the taxable estate. Since the denominator of the fraction is the value of the apportionable estate, the sum of the numerators of all persons having an interest in the apportionable estate will equal the denominator, and so 100% of the estate taxes will be apportioned. Consider the following example.

Ex. D died leaving a gross estate with a value of \$10,150,000 and made no provision for apportionment of taxes. D's will made pecuniary devises totaling \$1,000,000, and gave the residue to A and B equally. There are no claims against the estate and no marital or charitable deductions are allowable. The fu-



neral expenses are \$10,000, and the estate incurred administrative expenses of \$240,000 of which, while all were allowed as administrative expenses by the State probate court, \$100,000 was disallowed by the Service for a federal estate tax deduction on the ground that \$100,000 of the expenses was not necessary for the administration of the estate. See Rev. Rul. 77-461 and TAM 7912006. The personal representative elected to deduct the remaining \$140,000 of administrative expenses as a federal estate tax deduction. For federal estate tax purposes, the apportionable estate is equal to the difference between the gross estate (\$10,150,000) and the allowable deductions of \$150,000 (\$140,000 deductible administrative expenses and \$10,000 deductible funeral expenses); and so the apportionable estate is \$10,000,000. The value of the two residuary beneficiaries' interests in the apportionable estate is equal to the

difference between the entire apportionable estate of \$10,000,000 and the \$1,000,000 that was devised to the pecuniary beneficiaries. While the residuary beneficiaries will not receive any part of the \$100,000 of administrative expenses for which no federal estate tax deduction is allowable, that expense does not reduce the gross estate in determining the apportionable estate, and so does not affect the value of their residuary interests for the purpose of apportioning the federal estate tax. So, for purposes of apportioning the federal estate taxes, each residuary beneficiary has an interest in the apportionable estate valued at \$4,500,000, which constitutes 45% of the apportionable estate of \$10,000,000. Forty-five percent of the federal estate taxes is apportioned each to A and B, and 10% of the federal estate taxes is apportioned to the pecuniary beneficiaries.

**15-3-1303. Apportionment by will or other dispositive instrument.** — (a) Except as otherwise provided in subsection (c), the following rules apply:

- (1) To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly regardless of whether such will is probated.
- (2) Any portion of an estate tax not apportioned pursuant to paragraph (a)(1) of this section must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two (2) or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph:

(A) A trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(B) The date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

- (3) If any portion of an estate tax is not apportioned pursuant to paragraph (a)(1) of this section or paragraph (a)(2) of this section, and a provision in any other dispositive instrument expressly and unambiguously directs that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.

(b) Subject to subsection (c) of this section, and unless the decedent expressly and unambiguously directs the contrary, the following rules apply:

- (1) If an apportionment provision directs that a person receiving an interest in property under an instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned to the interest,

(A) The tax attributable to the exonerated interest must be apportioned among the other persons receiving interests passing under the instrument, or

(B) If the values of the other interests are less than the tax attributable to the exonerated interest, the deficiency must be apportioned ratably among the other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

(2) If an apportionment provision directs that an estate tax is to be apportioned to an interest in property a portion of which qualifies for a marital or charitable deduction, the estate tax must first be apportioned ratably among the holders of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the deductible portion to the extent that the value of the nondeductible portion is insufficient.

(3) Except as otherwise provided in paragraph (4) of this subsection, if an apportionment provision directs that an estate tax be apportioned to property in which one (1) or more time-limited interests exist, other than interests in specified property under section 15-3-1307, Idaho Code, the tax must be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property.

(4) If an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one (1) or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax must first be apportioned, to the extent feasible, to interests in property that have not been distributed to the persons entitled to receive the interests.

(c) A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent had no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this subsection, a testamentary power of appointment is a power to transfer the property that is subject to the power.

(d) For purposes of this section, a decedent's will, revocable trust, or other dispositive instrument that contains the applicable phrase(s) set forth in paragraphs (1), (2) or (3) of this subsection (or other substantially similar language in other dispositive instruments not listed in said paragraphs), shall satisfy the part's requirement for an express and unambiguous direction as to what properties are to bear or not bear the payment of those taxes. Other language may be used to direct the apportionment of the estate tax, but if it is determined by a court that the direction in the will, trust, or other dispositive instrument does not expressly and unambiguously direct the apportionment of all of the estate tax with respect to all property that constitutes the gross estate, the estate tax that is not clearly and unambiguously apportioned shall be apportioned in accordance with the provisions of this part. The portions of said phrase(s) set forth in parentheses indicate suggestions or descriptions of alternate language for the word or phrase immediately preceding the language in parentheses which may be added, deleted, or varied in the instrument. Said phrases are:



(1) In the case of a will, “all taxes arising as a result of my death, whether attributable to assets passing under this will or otherwise, shall be paid out of the residue of my probate estate (or apportioned to other specifically identified assets, probate or otherwise)”; or

(2) In the case of a revocable trust, “all taxes arising as a result of the Grantor’s (Settlor’s or Trustor’s) death, whether attributable to assets passing under this trust instrument or otherwise, shall be paid out of the residue of the trust estate (or apportioned to other specifically identified assets in trust or otherwise)”; or

(3) In the case of a charitable remainder trust as to assets already transferred to or in the trust, “no estate taxes and state death taxes shall be charged or apportioned to and paid from the assets of this charitable remainder trust” or “The (lifetime or term) annuity (unitrust) interest of the Successor Recipient (Beneficiary) will take effect upon the death of the Initial Recipient (Beneficiary) only if the Successor Recipient (Beneficiary) furnishes the funds for payment of any federal estate taxes and state death taxes for which the Trustee may be liable upon the death of the Initial Recipient (Beneficiary). If the funds are not furnished by the Successor Recipient (Beneficiary), the annuity (unitrust) period shall terminate on the death of the Initial Recipient (Beneficiary), notwithstanding any other provision in this instrument to the contrary.” [I.C., § 15-3-1303, as added by 2004, ch. 54, § 2, p. 246.]

#### STATUTORY NOTES

**Compiler’s Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

#### OFFICIAL COMMENT

A decedent’s direction will not control the apportionment of taxes unless it explicitly refers to the payment of an estate tax and is specific and unambiguous as to the direction it makes for that payment. For example, a testamentary direction that “all debts and expenses of and claims against me or my estate are to be paid out of the residuary of my probate estate” is not an express direction for the payment of estate taxes and will not control apportionment. While an estate tax is a claim against the estate, a will’s direction for payment of claims that does not explicitly mention estate taxes is likely to be a boiler plate that was written with no intention of controlling tax apportionment. To protect against an inadvertent inclusion of estate tax payment in a general provision of that nature, the Act requires that the direction explicitly mention estate taxes.

On the other hand, a direction in a will that “all taxes arising as a result of my death, whether attributable to assets passing under this will or otherwise, be paid out of the residue of my probate estate” satisfies the

Act’s requirement for an explicit mention of estate taxes and is specific and unambiguous as to what properties are to bear the payment of those taxes.

Whether other directions of a decedent that explicitly mention estate taxes comply with the Act’s requirement that they be specific and unambiguous is a matter for judicial construction. For example, there is a split among judicial decisions as to whether a direction such as “all estate taxes be paid out of the residue of my estate” is ambiguous because it is unclear whether it is intended to apply to taxes attributable to nonprobate assets. To the extent that it is determined that a decedent failed to apportion an estate tax, then the Act will apply to apportion that amount of the tax.

If an amendment is made to a revocable trust instrument, and if the amendment itself contains an express and unambiguous provision apportioning an estate tax, the date of the amendment is the date of the revocable trust instrument. However, if an amendment to a revocable trust instrument does not con-



tain an express and unambiguous provision apportioning an estate tax, the date of the revocable trust instrument is the date on which it was executed or the date of the most recent amendment containing an express and unambiguous provision apportioning an estate tax. An express and unambiguous provision apportioning an estate tax includes a provision directing that payment of an estate tax be made from specified property.

The statutory apportionment rules of the Act are default rules applicable to the extent that the decedent does not make a valid provision as to how estate taxes are to be apportioned. The decedent has the power to determine which recipients of decedent's property will bear the estate taxes and in what proportion. If provisions conflict, it is necessary to determine which prevails. A possible choice would permit the directions in each of decedent's instruments determine the extent to which property controlled by that instrument bears a share of estate taxes, but having the provisions for an allocation scheme scattered among a number of documents would make decedent's personal representative search multiple instruments to ascertain the decedent's directions. Instead, the Act provides an order of priority for a decedent's provisions for estate tax allocations. To the extent that a decedent makes an express and unambiguous provision by will, that provision will trump any competing provision in another instrument. To the extent that the will does not expressly and unambiguously provide for the allocation of some estate taxes, an express and unambiguous provision in a revocable trust instrument will control. If the decedent executed more than one revocable trust instrument, the express provisions in the instrument that was executed most recently will control. In determining which revocable trust instrument was executed most recently, the date of any amendment containing an express and unambiguous apportionment provision will be taken into account. In the event that the allocation of estate taxes is not fully provided for by the decedent's will or revocable trust instrument, an express and unambiguous provision in other instruments executed by the decedent controls to the extent that the provision applies to the property disposed of in that instrument. An example of a provision in an instrument disposing of property, other than a will or revocable trust instrument, is a provision in a designation of a beneficiary of life insurance proceeds either that the proceeds will or will not be used to pay a portion of estate taxes. A designation of that form will be honored if there is no conflicting valid provision in a will or revocable trust instrument.

A provision in decedent's will, revocable trust, or other instrument will not be honored

to the extent that it would contravene subsection (c).

The exclusivity of the provisions of this section apply only to apportionment rules; they do not prevent a dispositive instrument from making additional gifts; nor do they prevent a governing instrument of an entity from rearranging the internal division of the assets of that entity.

Ex.(1). On D's death, her will apportioned \$100,000 of estate taxes to the holders of interests in the D Family Trust, an irrevocable trust created by D during her life. The D Family Trust is divided into two separate shares: the William Share, and the Franklin Share, each of which is for a different child of D. The William Share is for the benefit of William, and the Franklin Share is for the benefit of Franklin. The trust instrument provides that any taxes apportioned to the holders of interests in the trust or to any share of the trust are to be paid from the William Share. The effect of that trust provision is to require that taxes reduce the size of the William Share and do not reduce the Franklin Share. The apportionment provision in D's will established the amount of estate tax that the trust must bear; the amount apportioned to the D Family Trust makes all of the assets of that trust liable for that amount. Since the decedent's will did not direct how the trust's burden should be allocated between the two shares of the trust, the direction in the trust instrument is not inconsistent with the will provision and so can control the allocation of taxes between properties disposed of in the trust instrument under subsection (c). Even if the direction in the trust instrument were deemed not to be permitted by subsection (c), the direction would be effective as a disposition of trust assets as explained in Example (2).

Ex. (2). The same facts as those stated in Ex. (1) except that D's will apportioned the \$100,000 of estate taxes to the Franklin Share of the D Family Trust. The trust provision placing the burden of the tax on the William Share cannot qualify as an apportionment direction since it is in conflict with the will provision allocating all of the trust's share of the estate tax to the Franklin Share. But the settlor has the power to direct trust assets to whomever the settlor pleases. The direction in the trust instrument that assets of the William Share are to be used to pay any taxes apportioned to the Franklin Share is a gift to Franklin of assets from the William Share. The direction is valid as a provision shifting trust assets from the William Share to the Franklin Share, which is a permissible disposition of a trust instrument.

The federal estate tax laws enable a decedent's personal representative to collect a portion of the decedent's federal estate tax

from the recipients of certain nonprobate property that is included in the decedent's gross estate. See e.g., §§2206 to 2207B of the Internal Revenue Code. There is a conflict among the courts as to whether those federal provisions preempt a State law apportionment provision. Choosing the position that there is no federal preemption, the Act apportions taxes without regard to the federal provisions. The federal provisions are not apportionment statutes; rather, they simply empower the personal representative to collect a portion of the estate tax that is attributable to the property included in the decedent's gross estate and do not direct use of the collected amounts by the personal representative. The rights granted to the personal representative by federal law for the collection of assets from nonprobate beneficiaries do not conflict either with the apportionment of taxes by State law or with other rights of collection granted by State law. Since there is no conflict, this Act does not include a direction as to whether federal or State law takes priority.

The Act does not permit anyone other than the decedent to override the allocation provisions of the Act. For example, if X created a QTIP trust for Y, the value of the trust assets will be included in Y's gross estate for federal estate tax purposes on Y's death. See §2044 of the Internal Revenue Code of 1986. If X's QTIP trust provided that the trust is not to bear any of the estate taxes imposed at Y's death, the direction would be ineffective under the Act because only Y can direct apportionment of taxes on Y's estate. In this regard, it is noteworthy that the right granted to a decedent's estate by §2207A of the Internal Revenue Code to collect a share of the federal estate tax from a QTIP included in the decedent's gross estate can be waived only by direction of the decedent in a will or revocable trust instrument. Y is in the best position to determine the optimum allocation of Y's estate taxes among the various assets that comprise Y's gross estate. If Y fails to make an allocation, the default provisions of the Act are more likely to reflect Y's intentions than would a direction of a third person.

If an instrument transferring property that may be included in the taxable estate of someone other than the transferor directs payment from the transferred property of any part of the estate taxes of the other person, the direction affects the size of the gift, and so is a dispositive rather than an apportionment provision, and is not subject to this Act.

If a decedent makes a valid direction that a person receiving property under a particular disposition is exonerated from payment of an estate tax, the tax that would have been borne by that person will, instead, be borne by other persons receiving interests under the instru-

ment directing the exoneration. Thus, if several assets are disposed of by a governing instrument, which exonerates one or more of those assets from bearing an estate tax, the exoneration will not reduce the amount of estate tax to be allocated to all of the assets disposed of by that instrument, including the exonerated assets. For example, if decedent's will directs that all federal estate taxes attributable to decedent's probate estate be paid from the residuary of his estate, the exoneration of the pre-residuary devisees will not affect the total amount of federal estate tax apportioned to the beneficiaries of the probate estate, all of which tax will be borne by the residuary beneficiaries if the residuary is sufficient. If the value of the other interests is insufficient to pay the estate taxes, the difference will be payable by other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

If a decedent directs that estate taxes be paid from properties, some of which qualify for a marital or charitable deduction, the provision making that direction may designate the extent to which the charitable or marital interests will or will not bear a portion of the tax. If the decedent makes no provision as to whether the marital or charitable interests bear a portion of the tax, the Act provides a default rule that exempts the marital or charitable interests from payment of the tax to the extent that it is feasible to do so. An example of when this circumstance arises is when the decedent's will makes a residuary devise, a portion of which qualifies for a marital or charitable deduction and a portion of which does not. If the decedent provides that estate taxes are to be paid from the residuary, unless directed otherwise, the default provision of the Act will require the payment to be made first from the nondeductible interests in the residuary. The default rule does not apply to an allocation of tax to a holder of an interest in property in which there is a time-limited interest; the tax allocated to any interest in that property is to be paid from the principal of the property unless the decedent expressly directed otherwise or unless Section 7 applies to the property.

If a decedent created a trust during life the value of which is included in the decedent's gross estate at death, if immediately after decedent's death, there were one or more time-limited interests in the trust that did not qualify for an estate tax deduction, and if one or more charities held a remainder interest in the trust that otherwise qualified for an estate tax charitable deduction, the charitable deduction for the remainder interests may be lost if the estate taxes generated by the nondeductible time-limited interests are to be paid from assets in the trust. See Rev. Rul.



82-128, Rev. Proc. 90-30 (§§ 4 and 5), and Rev. Proc. 90-31 (§§ 5 and 6). It is possible that if the payment of an estate tax is made from funds that, while directed to be added to the trust's assets, had not been distributed to the trust before payment of the estate tax, the payment will not disqualify the charitable deduction. There are numerous instances in which estate taxes are required to be paid from a charitable remainder trust that was created inter vivos. Subsection (b)(4) is an attempt to protect the deduction in such cases by establishing a rule of construction requiring that funds directed to be added to the trust be used to pay any required estate tax before assets already in the trust itself are used. It seems unlikely that a decedent would wish to negate this construction of decedent's direction, but the decedent has the power to do so by including an express statement to that effect in a will or revocable trust instrument.

If a decedent had made an irrevocable transfer during his life, over which the decedent did not retain a power to make a subsequent transfer, and if that transfer is included in the decedent's gross estate for estate tax purposes, a portion of the estate tax will be apportioned to the transferee unless the decedent effectively provides otherwise in a will, revocable trust or other instrument. While, by an express provision in the appropriate instrument, a decedent can reduce the amount of tax apportioned to such inter vivos transfers, the decedent is not permitted to increase the amount of tax apportioned to such a

transferee. If a decedent attempts to do so, whether directly by apportioning more estate tax to the inter vivos transfer or indirectly by insulating some person interested in the gross estate from all or part of that person's share of the estate tax, the amount of estate tax that is apportioned to the transferee of an irrevocable inter vivos transfer will not be greater than the amount that would have been apportioned to that transferee if the decedent had made no provision for apportionment in another instrument.

Subsection (c) does not apply to a decedent's provision that no estate tax be apportioned to the recipient of an interest who would be excluded from apportionment by this Act in the absence of a contrary direction by the decedent. For example, a decedent's provision that no estate tax be apportioned to the recipient of property that qualifies for a marital or charitable deduction is not subject to subsection (c).

If a decedent transferred property to a revocable trust prior to executing a will that directs the apportionment of taxes to that trust, the apportionment direction will be valid even if the decedent subsequently released the power of revocation so that the trust became irrevocable prior to the decedent's death. In such a case, Subsection (c) does not invalidate the will's direction.

If, immediately before the decedent's death, the decedent had a power of appointment, whether inter vivos or testamentary, the decedent had the power to transfer the property interest within the meaning of this provision.

**15-3-1304. Statutory apportionment of estate taxes.** — To the extent that apportionment of an estate tax is not controlled by an instrument described in section 15-3-1303, Idaho Code, and except as otherwise provided in sections 15-3-1306 and 15-3-1307, Idaho Code, the following rules apply:

(1) Subject to subsections (2), (3) and (4) of this section, the estate tax is apportioned ratably to each person that has an interest in the apportionable estate.

(2) A generation-skipping transfer tax incurred on a direct skip taking effect at death is charged to the person to whom the interest in property is transferred.

(3) If property is included in the decedent's gross estate because of section 2044 of the Internal Revenue Code of 1986 or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of estate tax for which the decedent's estate would have been liable if the property had not been included in the decedent's gross estate is apportioned ratably among the holders of interests in the property. The balance of the tax, if any, is apportioned ratably to each other person having an interest in the apportionable estate.



(4) Except as otherwise provided in section 15-3-1303(b)(4), Idaho Code, and except as to property to which section 15-3-1307, Idaho Code applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property. [I.C., § 15-3-1304, as added by 2004, ch. 54, § 2, p. 246.]

#### OFFICIAL COMMENT

The value of an interest in the apportionable estate is determined in accordance with Section 2(7) of the Act.

Property values subtracted from the decedent's gross estate in determining the apportionable estate under Section 2(1) are excluded from the apportionable estate, and beneficiaries of those properties do not have any estate tax apportioned to them because of their interest in those properties. This treatment is consistent with the Restatement (Third) of Property: Wills and Other Donative Transfers §1.1, comment g (1998). The Act adopts a method of equitable apportionment of estate taxes, but does not follow the Restatement method which allocates taxes apportioned to probate assets first to the residuary beneficiaries and invites preferential treatment for beneficiaries of specific and pecuniary gifts by will over beneficiaries of gifts by various non-probate transfer methods.

A "direct skip" currently is defined in §§ 2612(c) and 2613 of the Internal Revenue Code. Section 2603(b) of the Internal Revenue Code states that, unless directed otherwise in the governing instrument, the tax on a generation-skipping transfer is charged to the property constituting the transfer. Section 2603(a)(3) of the Internal Revenue Code imposes the duty of paying the tax on a direct skip on the transferor of the property. Under paragraph (2), the decedent's personal representative will pay the generation-skipping tax on a direct skip out of the transferred property (or the proceeds from a sale of all or some of that property). To the extent that it is not feasible or practical to pay the tax from the transferred property, the transferees are to pay their proportionate share of the shortfall. Paragraph (2) is consistent with the treatment provided by federal law.

The property to which paragraph (3) applies is sometimes referred to as "QTIP property" since § 2044 of the Internal Revenue Code of 1986 deals with "qualified terminable

interest property." See §§ 2044(b)(1), 2056(b)(7), and 2523(f) of the Internal Revenue Code of 1986. Although the general rule of apportionment in the Act is to apportion estate taxes on the basis of the average rate of tax, the tax apportioned to the holders of interests in QTIP property by the Act is based on the marginal rate of tax. Note that federal estate tax law grants the decedent's fiduciary the power to collect from the holders of the QTIP property the estate tax generated by that property at the marginal estate tax rate of the decedent's estate. The Act tracks the federal law in this respect.

It would be harsh to collect the estate tax from persons holding discretionary or contingent interests in property since they may not obtain possession for many years, if at all. Hence, when the tax is apportioned to persons holding interests in property in which there are time-limited interests, paragraph (4) requires the tax to be paid from principal. This provision does not apply to property for which a special elective benefit (as described in Section 7) has been elected.

An estate tax that is apportioned to an interest in property that cannot be reached because of legal or practical obstacles but is not subject to a time-limited interest is to be collected from the interest holder to the extent feasible. In that circumstance, since there is no time-limited interest, the tax will not be apportioned to a person who may not receive property for many years if at all.

When some of the interests in property qualify for a charitable or marital deduction and some do not, requiring the tax to be paid from the principal of the property may reduce the amount of marital or charitable deduction that is allowable. Although the likely intent of a decedent would be to maximize the marital and charitable deductions available for the estate, paragraph (4) provides that the estate tax is to be paid from the principal of the property, a choice that avoids administrative complexity.

**15-3-1305. Credits and deferrals.** — Except as otherwise provided in sections 15-3-1306 and 15-3-1307, Idaho Code, the following rules apply to credits and deferrals of estate taxes:

(1) A credit resulting from the payment of gift taxes or from estate taxes paid on property previously taxed inures ratably to the benefit of all persons to which the estate tax is apportioned.

(2) A credit for state or foreign estate taxes inures ratably to the benefit of all persons to which the estate tax is apportioned, except that the amount of a credit for a state or foreign tax paid by a beneficiary of the property on which the state or foreign tax was imposed, directly or by a charge against the property, inures to the benefit of the beneficiary.

(3) If payment of a portion of an estate tax is deferred because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral inures ratably to the persons to which the estate tax attributable to the interest is apportioned. The burden of any interest charges incurred on a deferral of taxes and the benefit of any tax deduction associated with the accrual or payment of the interest charge is allocated ratably among the persons receiving an interest in the property. [I.C., § 15-3-1305, as added by 2004, ch. 54, § 2, p. 246.]

#### OFFICIAL COMMENT

Section 2013 of the Internal Revenue Code of 1986 allows a credit for federal estate taxes paid on certain properties that were included in the taxable estate of a person who died within a relatively short time of the decedent's death. This credit often is referred to as a credit for property previously taxed.

A beneficiary of property attracting a foreign or State death tax may have paid that tax directly or may have paid it indirectly by virtue of the tax's being paid out of the property passing to that person. If that occurs, while the beneficiary's payment of the foreign or State tax reduces the amount that the

beneficiary will receive, it will not reduce the value of the beneficiary's interest in the apportionable estate according to the definition of "value" in this Act. See Section 2(7). The Act mitigates the beneficiary's burden by giving the beneficiary the benefit of any estate tax credit allowed for the foreign or State tax and paid by the beneficiary.

The benefits and burdens described in paragraph (3) are to be allocated ratably among persons in accordance with the amount of deferral or extension attributable to their interests in the apportionable estate.

**15-3-1306. Insulated property, advancement of tax.** — (a) In this section:

(1) "Advanced fraction" means a fraction that has as its numerator the amount of the advanced tax and as its denominator the value of the interests in insulated property to which that tax is attributable.

(2) "Advanced tax" means the aggregate amount of estate tax attributable to interests in insulated property which is required to be advanced by uninsulated holders under subsection (c) of this section.

(3) "Insulated property" means property subject to a time-limited interest which is included in the apportionable estate but is unavailable for payment of an estate tax because of impossibility or impracticability.

(4) "Uninsulated holder" means a person who has an interest in uninsulated property.

(5) "Uninsulated property" means property included in the apportionable estate other than insulated property.

(b) If an estate tax is to be advanced pursuant to subsection (c) of this section by persons holding interests in uninsulated property subject to a time-limited interest other than property to which section 15-3-1307, Idaho



Code applies, the tax must be advanced, without further apportionment, from the principal of the uninsulated property.

(c) Subject to section 15-3-1309(b) and (d), Idaho Code, an estate tax attributable to interests in insulated property must be advanced ratably by uninsulated holders. If the value of an interest in uninsulated property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency must be advanced ratably by the persons holding interests in properties that are excluded from the apportionable estate under section 15-3-1302(a)(2), Idaho Code, as if those interests were in uninsulated property.

(d) A court having jurisdiction to determine the apportionment of an estate tax may require a beneficiary of an interest in insulated property to pay all or part of the estate tax otherwise apportioned to the interest if the court finds that it would be substantially more equitable for that beneficiary to bear the tax liability personally than for that part of the tax to be advanced by uninsulated holders.

(e) When a distribution of insulated property is made, each uninsulated holder may recover from the distributee a ratable portion of the advanced fraction of the property distributed. To the extent that undistributed insulated property ceases to be insulated, each uninsulated holder may recover from the property a ratable portion of the advanced fraction of the total undistributed property.

(f) Upon a distribution of insulated property for which, pursuant to subsection (d) of this section, the distributee becomes obligated to make a payment to uninsulated holders, a court may award an uninsulated holder a recordable lien on the distributee's property to secure the distributee's obligation to that uninsulated holder. [I.C., § 15-3-1306, as added by 2004, ch. 54, § 2, p. 246.]

#### OFFICIAL COMMENT

The term "time-limited interest" is defined in Section 2(6) [§ 15-3-1302(f)].

Subsection (b) applies to property in which at least one person has a time-limited interest and which property can be reached by the personal representative of the decedent. In such cases, an estate tax that is payable as an advanced tax under subsection (c), is charged against the principal of the property, and is not apportioned among the several interests in that property. While there is no express apportionment of the advanced tax to the time-limited interests in the property, the holders of the time-limited interests will bear a share of the tax burden in that the resulting reduction of the value of the principal will reduce the value of the time-limited interests, except that it will not reduce the value of a dollar annuity interest. So, the holder of a dollar annuity interest will be exonerated from sharing in the burden of estate taxes.

Since the estate tax apportioned to the owners of insulated property cannot be col-

lected from the property, the tax is to be paid (as an advancement) by persons having interests in other assets of the estate (uninsulated holders), provided however that the total tax attributed to and advanced by an uninsulated holder cannot exceed the value of that person's interest in the uninsulated property. See Section 9(d). If the amount of the aggregate tax apportioned to and to be advanced by an uninsulated holder exceeds the value of that holder's interest in the uninsulated property, then the deficiency shall be apportioned to the holders of interests in properties that otherwise qualify for charitable or marital deductions. In such cases, those charitable and marital properties are reclassified as uninsulated properties, and so the beneficiaries of those properties will be uninsulated holders who will have a right of recovery from the distributees of insulated properties for which they paid a portion of the estate tax.

It would be harsh to make persons holding future interests in insulated property pay tax



on properties that they will not receive until years later and may never receive. If they were required to pay the tax at the time of decedent's death, that could give rise to widespread disclaimers of interests. Also, it would be difficult to value the interests of discretionary beneficiaries. For that reason, with one exception set forth in subsection (d), the tax attributable to insulated properties is reallocated to uninsured holders who are required to advance the funds to pay the tax.

The tax attributable to the insulated property that is required to be paid by the uninsured holders is referred to as an "advanced tax." To permit the uninsured holders who bear the advanced tax to be reimbursed, the Act effectively provides the uninsured holders with a phantom percentage interest in the property whose transfer is the source of the advanced tax. While the phantom percentage interest of the uninsured holder remains constant, its value will increase or decrease as the value of the property changes. The phantom percentage interest is determined by dividing the advanced tax by the aggregate value of insulated properties as determined for purposes of the estate tax. When a distribution of insulated property is made, a percentage of that distribution must be paid over to the uninsured holders; and this is a personal obligation of the distributee. If it were not for this Section, the uninsured holders would have had a right of reimbursement under Section 10 for the amount of their outlay from the distributees; but instead, subsection (e) gives them a right to a fraction of the distributed amount rather than to a fixed dollar amount. The amount collected from a distributee is divided among the uninsured holders according to the percentage of the advanced tax that they paid.

It is important to note that the uninsured holders do not have an actual interest in the insulated property and have no lien or security interest in that property while it is in the possession of the trust or fund. The uninsured holders only have a claim against the persons who receive distributions from the trust or fund which holds the insulated property. The only exception is where previously insulated property loses its insulation so that it can be reached by the uninsured holders without violating any prohibition against alienation of interests. Once insulated property is in the hands of a distributee, subsection (f) permits the uninsured holders to seek a lien on the distributee's property for the amount owed to them; but there is no lien or other encumbrance on the insulated property while it is in the possession of the trust or fund.

The operation of this Section is illustrated in the following examples.

Ex. (1) X dies having a gross estate and an apportionable estate of \$10M and devises his probate property (with a value of \$8M) to A, B and C, with A and B each receiving 40% of the probate estate, and C receiving 20%. In addition to the probate property, X had an interest in a nonqualified pension plan at his death which interest had a value of \$2M. X's contract with the plan provides that an annuity of \$120,000 per year is to be paid to G for life, and upon G's death the remainder of the corpus is to be paid to L. The only estate tax to which X's estate is subject is the federal estate tax. The federal estate tax on X's \$10M gross estate is \$4M. So, the average rate of the estate tax is 40%. Under Section 4(1), the estate tax that is attributable to the \$2M pension fund is \$800,000 -- the value of the property interests that G and L hold in the fund (\$2M) is 20% of the \$10M value of the entire apportionable estate, and so 20% of the \$4M estate tax is attributable to the pension fund. Assume that under local law, the assets of the pension fund cannot be reached by creditors or by the personal representative of X's estate in order to use those funds to pay estate taxes. Under Subsection (c), the personal representative will collect 40% of the \$800,000 (i.e., \$320,000) from A and a like amount from B; and the personal representative will collect \$160,000 from C.

The advanced fraction for the pension fund is \$800,000 (the amount of the estate tax that was advanced by A, B, and C) divided by the \$2M value of the fund (the insulated property), which division results in a percentage of 40%. Putting it differently, the \$800,000 estate tax attributable to the fund but not paid by those interested in the fund constitutes 40% of the \$2M value of the fund. To compensate A, B and C for paying the advanced tax, they obtain what amounts to a 40% phantom interest in the fund. Their actual interest arises only when distributions are made from the fund or, in the event that the fund loses its insulation from creditors, when that occurs.

In Year One, the fund pays \$120,000 to G pursuant to the terms of the contract. Forty percent of that distribution (\$48,000) must be paid by G to A, B and C -- 40% or \$19,200 payable to A and another \$19,200 payable to B, and 20% or \$9,600 payable to C, since that is the proportion in which they bore the advanced tax. The next year, the fund distributes another \$120,000 to G, and the same payments must be made to A, B and C. In the third year, G dies, and the fund distributes the remaining principal of \$2,400,000 to L; the value of the principal had increased because of an increase in the value of the investments the fund held. A, B, and C are entitled to 40% of that \$2,400,000, and so L must pay them \$960,000, to be divided among them. A and B will each receive \$384,000

(40% of the \$960,000), and C will receive \$192,000 (20% of \$960,000).

Ex. (2) X dies leaving a taxable estate of \$10,000,000 on which a federal estate tax of \$5,000,000 is payable (for convenience of computation, we treat all of X's estate as subject to a tax at a 50% marginal rate). X's estate has no marital or charitable deductions. X left \$4,000,000 of assets in an offshore trust that cannot be reached by X's personal representative and so constitutes insulated property. The federal estate tax attributable to that property is \$2,000,000. X had other nonprobate assets having an aggregate value of \$2,000,000 and a residuary estate of \$4,000,000. The holders of the nonprobate assets will have \$1,000,000 in federal estate taxes apportioned to them, and the holders of the residuary interests will have \$2,000,000 of federal estate taxes attributed to them. But, the personal representative must also pay the \$2,000,000 of federal estate taxes attributable to the offshore assets. If the holders of interests in those assets cannot be reached, and if the Act did not apply, the personal representative would have to pay the \$2,000,000 from the residuary of the estate, thereby wiping it out completely. Under the Act, a of the \$2,000,000 of federal estate tax attributable to the offshore assets (\$666,667) will be paid by the holders of the other nonprobate assets, and the remaining \$1,333,333 of that tax will be paid by the beneficiaries of the residuary estate. Under the Act, the holders of the other nonprobate assets will have to bear their proportionate share of the tax on the offshore assets. When distributions are made of the offshore assets,

the distributees will be personally liable to pay a portion of their distribution to the persons who paid the estate tax on the offshore fund.

If undistributed insulated property loses its insulation from claims, the uninsulated holders can collect the balance of their interest from the property at that time.

In certain circumstances, it would be more equitable to require the beneficiary of an interest in insulated property to bear the tax on that interest than to reapportion it to others. For example, if the beneficiary's interest is one that will become possessory in a short period of time, so that the beneficiary will soon have possession of assets from the fund or trust, it would be more equitable to place personal liability on that beneficiary; and the court has discretion to do so. In determining whether a beneficiary is likely to obtain possession of all or a significant part of the beneficiary's interest in the insulated property, the court can consider not only distributions that are required to be made to the beneficiary, but also distributions that, based on an examination of the history of the administration of the fund or trust, are likely to be made in the near future. Subsection (d) provides the court with the discretion to make that determination. While a beneficiary's receipt of a distribution from the trust or fund would make that beneficiary liable to uninsulated holders who paid the advanced tax, that places a burden of collection on the uninsulated holders; and so, when the distribution is likely to be made to a beneficiary within a short period of time, it would be more equitable to have that beneficiary bear the tax.

**15-3-1307. Apportionment and recapture of special elective benefits.** — (a) In this section:

(1) "Special elective benefit" means a reduction in an estate tax obtained by an election for:

(A) A reduced valuation of specified property that is included in the gross estate;

(B) A deduction from the gross estate, other than a marital or charitable deduction, allowed for specified property; or

(C) An exclusion from the gross estate of specified property.

(2) "Specified property" means property for which an election has been made for a special elective benefit.

(b) If an election is made for one (1) or more special elective benefits, an initial apportionment of a hypothetical estate tax must be computed as if no election for any of those benefits had been made. The aggregate reduction in estate tax resulting from all elections made must be allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation, or exclusion attributable to each holder's interest bears to the aggregate amount of deductions, reduced



valuations, and exclusions obtained by the decedent's estate from the elections. If the estate tax initially apportioned to the holder of an interest in specified property is reduced to zero, any excess amount of reduction reduces ratably the estate tax apportioned to other persons that receive interests in the apportionable estate.

(c) An additional estate tax imposed to recapture all or part of a special elective benefit must be charged to the persons that are liable for the additional tax under the law providing for the recapture. [I.C., § 15-3-1307, as added by 2004, ch. 54, § 2, p. 246.]

#### OFFICIAL COMMENT

The types of special elective benefits at which this provision is aimed are currently set forth in §§ 2031(c), 2032A, and 2057 of the Internal Revenue Code of 1986. Section 2032A provides an election whereby "qualified real property" (real property that is used for a specified purpose and is held by certain parties related to the decedent) will be given a lower valuation for federal estate tax purposes than otherwise would have been true. Under § 2032A(c), if within 10 years after the decedent's death the qualified heir disposes of an interest in the qualified realty or ceases to use it for its required purpose, an additional estate tax will be imposed to recapture some of the estate tax reduction that was obtained through the election. The purpose of this Section is to define how the benefit of an estate tax reduction of this or a similar type will be allocated and how any additional estate tax imposed to recapture some of that tax benefit will be allocated.

Another federal estate\* tax provision to which this Section applies is § 2057 of the Internal Revenue Code of 1986. That provision grants an election to receive a special estate tax deduction for a "qualified family-owned business interest." Under § 2057(f), if, within 10 years after the decedent's death, one of four listed events occurs, an additional federal estate tax will be imposed in order to recapture some of the tax reduction obtained by electing to take the deduction. This Section defines how the benefits of the election and the burden of an additional tax will be apportioned. The Economic Growth and Tax Relief Reconciliation Act of 2001 repealed § 2057 for the estates of decedent's dying after the year 2003. However, the 2001 Act retains the 10-year recapture provision, and the sunset provision will reinstate § 2057 in the year 2011 unless the repeal is made permanent.

Section 2031(c) of the Internal Revenue Code of 1986 provides an election whereby a portion of the value of land that is subject to a qualified conservation easement, as defined in § 2031(c)(8), is excluded from the gross estate. The exclusion does not apply to the value of a

retained development right; but if, prior to the date for filing the estate tax return, all the persons who have an interest in the land execute an agreement to extinguish some or all of the development rights, an additional estate tax deduction will be allowed by § 2031(c)(5). A failure to implement that agreement within a specified time will cause the imposition of an additional estate tax to recapture that deduction. The allocation of the benefits of the exclusion and of the deduction for making the agreement, and the allocation of any additional estate tax, is determined by this Section.

The allocation of the aggregate tax reduction obtained from all special elective benefits is made among the holders of interests in the specified properties in accordance with the reduction of the decedent's taxable estate that is attributable to each holder's interest. Since the determination of the amount of estate tax benefit is made by applying the marginal rate of estate tax to the reduced value of the gross estate, it is necessary to aggregate the tax reduction obtained from all of the special election benefits so that the greater tax reduction obtained from using a marginal rate is not duplicated by applying that rate to several distinct reductions.

Once the amount of estate tax that is apportioned to the holder of an interest in specified property is determined, it will have to be paid. The holders of interests in a specified property may have difficulty paying that tax. To pay the tax, the holders will have to sell the property, borrow against it, use other funds to pay the tax, or defer the payment of the tax under tax deferral provisions and pay the tax in installments with income produced by the property. If they were to sell the property, the special elective benefit would be lost; so a sale is not a viable option. Accordingly, the requirement of Sections 3(b)(3), 4(4), and 6(b) that the estate tax or an advanced tax be paid from the principal of property subject to a time-limited interest does not apply to properties for which an election for a special elective benefit is made.



The solution chosen in Section 6(c) and (e) of having other persons interested in the apportionable estate pay the tax and then collect reimbursement from distributees of the property is not practical here because there would be difficulty in determining what income was derived from the property itself, and there would be no trustee or other fiduciary to see that the amounts were turned over to the persons who paid the tax. So, that approach was not adopted. Instead, Sections 4(1) and this section apportion the estate tax to the holders of the interests in the properties who, facing the obligation to pay, can determine the best method for obtaining the

funds to make that payment.

If additional estate taxes are imposed to recapture some or all of a special elective benefit, Section 7 follows the allocation of liability imposed by the estate tax law that generated the additional tax. The burden of the additional estate tax will be borne by the persons who hold interests in the specified property at the time that the additional tax payment is made, and those persons may not be the same ones who held the specified property when the special elective benefit was allowed and so derived the benefit of that election.

**15-3-1308. Securing payment of estate tax from property in possession of fiduciary.** — (a) A fiduciary may defer a distribution of property until the fiduciary is satisfied that adequate provision for payment of the estate tax has been made.

(b) A fiduciary may withhold from a distributee an amount equal to the amount of estate tax apportioned to an interest of the distributee.

(c) As a condition to a distribution, a fiduciary may require the distributee to provide a bond or other security for the portion of the estate tax apportioned to the distributee. [I.C., § 15-3-1308, as added by 2004, ch. 54, § 2, p. 246.]

#### OFFICIAL COMMENT

Section 8 grants a fiduciary discretion either to retain funds or to require a distributee to provide security for payment of that distributee's share of the estate tax. The fidu-

ciary's exercise of that discretion and use of retained properties are subject to the fiduciary's duty to treat the parties fairly.

**15-3-1309. Collection of estate tax by fiduciary.** — (a) A fiduciary responsible for payment of an estate tax may collect from any person the tax apportioned to and the tax required to be advanced by the person.

(b) Except as otherwise provided in section 15-3-1306, Idaho Code, any estate tax due from a person that cannot be collected from the person may be collected by the fiduciary from other persons in the following order of priority:

- (1) Any person having an interest in the apportionable estate which is not exonerated from the tax;
- (2) Any other person having an interest in the apportionable estate;
- (3) Any person having an interest in the gross estate.

(c) A domiciliary fiduciary may recover from an ancillary personal representative the estate tax apportioned to the property controlled by the ancillary personal representative.

(d) The total tax collected from a person pursuant to this part may not exceed the value of the person's interest. [I.C., § 15-3-1309, as added by 2004, ch. 54, § 2, p. 246.]

## OFFICIAL COMMENT

If a fiduciary is unable to collect from a person the estate tax apportioned to that person or to be advanced by that person, the fiduciary is authorized to collect the deficiency from any person interested in the apportionable estate whose interest is not exonerated from tax apportionment. The fiduciary is not obliged to collect the deficiency ratably from such persons. At the fiduciary's discretion, the fiduciary is authorized to collect all of the deficiency from one person or from several persons in any proportion that the fiduciary chooses. The reason that the fiduciary is not required to collect a deficiency ratably is that the payment of the estate tax should not be delayed because of difficulties in collecting from a number of persons.

If the amount collected from persons whose interests in the apportionable estate is not exonerated from tax apportionment is insufficient to make up the deficiency, the fiduciary can then collect any remaining deficiency

from persons interested in the apportionable estate whose interests are exonerated from tax apportionment. This class excludes persons holding interests in property that qualified for a marital or charitable deduction since those interests are excluded from the apportionable estate. Again, the fiduciary is not required to collect the remaining deficiency ratably from the persons holding exonerated interests.

Finally, if the amount collected from persons holding exonerated interests is insufficient, the fiduciary can collect the balance from persons holding interests that qualify for a marital or charitable deduction. The fiduciary is not required to make that collection ratably.

Anyone who pays more than his share of an estate tax or an advanced tax has a ratable right of reimbursement from those who did not pay their share. If requested, the fiduciary may assist in collecting that reimbursement.

**15-3-1310. Right of reimbursement.** — (a) A person required under section 15-3-1309, Idaho Code, to pay an estate tax greater than the amount due from the person under section 15-3-1303 or 15-3-1304, Idaho Code, has a right to reimbursement from another person to the extent that the other person has not paid the tax required by section 15-3-1303 or 15-3-1304, Idaho Code, and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected under section 15-3-1309(b), Idaho Code.

(b) A fiduciary may enforce the right of reimbursement under subsection (a) of this section on behalf of the person that is entitled to the reimbursement and shall take reasonable steps to do so if requested by the person. [I.C., § 15-3-1310, as added by 2004, ch. 54, § 2, p. 246.]

## OFFICIAL COMMENT

The Act does not include a provision for interest on the collection of a reimbursement,

and the question of whether interest will be payable is left to the courts to decide.

**15-3-1311. Action to determine or enforce part.** — A fiduciary, transferee, or beneficiary of the gross estate may maintain an action including, but not limited to, petitioning for declaratory judgment, to have a court determine and enforce this part or may petition a court pursuant to section 15-3-704 or 15-7-201, Idaho Code, whichever is applicable. [I.C., § 15-3-1311, as added by 2004, ch. 54, § 2, p. 246.]

**15-3-1312. Uniformity of application and construction.** — In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. [I.C., § 15-3-1312, as added by 2004, ch. 54, § 2, p. 246.]

STATUTORY NOTES

**Compiler's Notes.** — The phrase “this uniform act” means the Uniform Estate Tax Apportionment Act, codified as §§ 15-3-1301 to 15-3-1314 by S.L. 2004, Chapter 54.

**15-3-1313. Severability.** — If any provision of this part or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this part which can be given effect without the invalid provision or application, and to this end the provisions of this part are severable. [I.C., § 15-3-1313, as added by 2004, ch. 54, § 2, p. 246.]

**15-3-1314. Delayed application.** — (a) Sections 15-3-1303 through 15-3-1307, Idaho Code, do not apply to the estate of a decedent who dies prior to January 1, 2005.

(b) For the estate of a decedent who dies on or after the effective date of this act, but prior to January 1, 2005, and as to which sections 15-3-1303 through 15-3-1307, Idaho Code do not apply, estate taxes must be apportioned pursuant to the law in effect immediately before the effective date of this act. [I.C., § 15-3-1314, as added by 2004, ch. 54, § 2, p. 246.]

STATUTORY NOTES

**Compiler's Notes.** — The phrase “effective date of this act”, referred to in subsection (b), means July 1, 2004, the effective date of S.L. 2004, Chapter 54.

CHAPTER 4

FOREIGN PERSONAL REPRESENTATIVES ANCILLARY ADMINISTRATION

PART 1. DEFINITIONS

SECTION.

15-4-101. Definitions.

SECTION.

15-4-207. Ancillary and other local administrations — Provisions governing.

PART 2. POWERS OF FOREIGN PERSONAL REPRESENTATIVES

- 15-4-201. Payment of debt and delivery of property to domiciliary foreign personal representative without local administration.
- 15-4-202. Payment or delivery discharges.
- 15-4-203. Resident creditor notice.
- 15-4-204. Proof of authority — Bond.
- 15-4-205. Powers.
- 15-4-206. Power of representatives in transition.

PART 3. JURISDICTION OVER FOREIGN REPRESENTATIVES

- 15-4-301. Jurisdiction by act of foreign personal representative.
- 15-4-302. Jurisdiction by act of decedent.
- 15-4-303. Service on foreign personal representative.

PART 4. JUDGMENTS AND PERSONAL REPRESENTATIVE

- 15-4-401. Effect of adjudication for or against personal representative.

PART 1. DEFINITIONS

**15-4-101. Definitions.** — In this chapter (a) “local administration” means administration by a personal representative appointed in this state pursuant to appointment proceedings described in chapter 3.

(b) “Local personal representative” includes any personal representative appointed in this state pursuant to appointment proceedings described in



chapter 3 and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to section 15-4-205 of this code.

(c) "Resident creditor" means a person domiciled in, or doing business in this state, who is, or could be, a claimant against an estate of a nonresident decedent. [I.C., § 15-4-101, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

### RESEARCH REFERENCES

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1098 et seq.

### COMMENT TO OFFICIAL TEXT

#### [General comment to §§ 15-4-101 — 15-4-401.]

This Article [Chapter] concerns the law applicable in estate problems which involve more than a single state. It covers the powers and responsibilities in the adopting state of personal representatives appointed in other states.

Some provisions of the code covering local appointment of personal representatives for non-residents appear in Article III [Chapter 3]. These include the following: 3-201 (venue), 3-202 (resolution of conflicting claims regarding domicile), 3-203 (priority as personal representative of representative previously appointed at domicile), 3-307(a) (30 days delay required before appointment of a local representative for a non-resident), 3-803(a) (claims barred by non-claim at domicile before local administration commenced are barred locally) and 3-815 (duty of personal representative in regard to claims where estate is being administered in more than one state). See also 3-308, 3-611(a) and 3-816. Also, see Section 4-207.

The recognition provisions contained in Article IV [Chapter 4] and the various provisions of Article III [Chapter 3] which relate to administration of estates of non-residents are designed to coerce respect for domiciliary procedures and administrative acts to the extent possible.

The first part of Article IV [Chapter 4] contains some definitions of particular relevance to estates located in two or more states.

The second part of Article IV [Chapter 4] deals with the powers of foreign personal representatives in a jurisdiction adopting the Uniform Probate Code. There are different types of power which may be exercised. First,

a foreign personal representative has the power under Section 4-201 to receive payments of debts owed to the decedent or to accept delivery of property belonging to the decedent. The foreign personal representative provides an affidavit indicating the date of death of the nonresident decedent, that no local administration has been commenced and that the foreign personal representative is entitled to payment or delivery. Payment under this provision can be made any time more than 60 days after the death of the decedent. When made in good faith the payment operates as a discharge of the debtor. A protection for local creditors of the decedent is provided in Section 4-203, under which local debtors of the non-resident decedent can be notified of the claims which local creditors have against the estate. This notification will prevent payment under this provision.

A second type of power is provided in Section 4-204 to 4-206. Under these provisions a foreign personal representative can file with the appropriate court a copy of his appointment and official bond if he has one. Upon so filing, the foreign personal representative has all of the powers of a personal representative appointed by the local court. This would be all of the powers provided for in an unsupervised administration as provided in Article III [Chapter 3] of the Code.

The third type of power which may be obtained by a foreign personal representative is conferred by the priority the domiciliary personal representative enjoys in respect to local appointment. This is covered by Section 3-203. Also, see Section 3-611(b).

Part 3 provides for power in the local court over foreign personal representatives who act locally. If a local or ancillary administration

has been started, provisions in Article III [Chapter 3] subject the appointee to the power of the court. See Section 3-602. In Part 3 of this Article [Chapter], it is provided that a foreign personal representative submits himself to the jurisdiction of the local court by filing a copy of his appointment to get the powers provided in Section 4-205 or by doing any act which would give the state jurisdiction over him as an individual. In addition, the collection of funds as provided in Section 4-201 gives the court quasi-in-rem jurisdiction over the foreign personal representative to the extent of the funds collected.

Finally, Section 4-303 [4-302] provides that the foreign personal representative is subject to the jurisdiction of the local court "to the same extent that his decedent was subject to jurisdiction immediately prior to death." This is similar to the typical non-resident motorist provision that provides for jurisdiction over

the personal representative of a deceased non-resident motorist, see Note, 44 Iowa L. Rev. 384 (1959). It is, however, a much broader provision. Section 4-304 [4-303] provides for the mechanical steps to be taken in serving the foreign personal representatives.

Part 4 of the Article [Chapter] deals with the res judicata effect to be given adjudications for or against a foreign personal representative. Any such adjudication is to be conclusive on a local personal representative "unless it resulted from fraud or collusion . . . to the prejudice of the estate." This provision must be read with Section 3-408 which deals with certain out-of-state findings concerning a decedent's estate.

#### [Comment to § 15-4-101.]

Section 1-201 includes definitions of "foreign personal representatives," "personal representative" and "non-resident decedent."

### PART 2. POWERS OF FOREIGN PERSONAL REPRESENTATIVES

**15-4-201. Payment of debt and delivery of property to domiciliary foreign personal representative without local administration.** — At any time after the expiration of sixty (60) days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

- (a) The date of the death of the nonresident decedent;
- (b) That no local administration, or application or petition therefor, is pending in this state;
- (c) That the domiciliary foreign personal representative is entitled to payment or delivery. [I.C., § 15-4-201, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1070 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1098 et seq.

### COMMENT TO OFFICIAL TEXT

Section 3-201(d) refers to the location of tangible personal estate and intangible personal estate which may be evidenced by an instrument. The instant section includes both categories. Transfer of securities is not cov-

ered by this section since that is adequately covered by Section 3 of the Uniform Act for Simplification of Fiduciary Security Transfers. [See §§ 68-901 — 68-911.]

**15-4-202. Payment or delivery discharges.** — Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative. [I.C., § 15-4-202, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

<b>Am. Jur.</b> — 31 Am. Jur. 2d, Executors and Administrators, § 1070 et seq.	<b>C.J.S.</b> — 34 C.J.S., Executors and Administrators, § 1098 et seq.
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**15-4-203. Resident creditor notice.** — Payment or delivery under section 15-4-201 of this Part may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative. [I.C., § 15-4-203, as added by 1975, ch. 111, § 1, p. 233.]

COMMENT TO OFFICIAL TEXT

Similar to provision in Colorado Revised Statute, 153-6-9 [15-13-203 CRS].

**15-4-204. Proof of authority — Bond.** — If no local administration or application or petition therefor is pending in this state, a domiciliary foreign personal representative may file with a court in this state in a county in which property belonging to the decedent is located, authenticated copies of his appointment and of any official bond he has given. [I.C., § 15-4-204, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

<b>Am. Jur.</b> — 31 Am. Jur. 2d, Executors and Administrators, §§ 220 et seq., 312 et seq.	<b>C.J.S.</b> — 34 C.J.S., Executors and Administrators, § 1098 et seq.
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**15-4-205. Powers.** — A domiciliary foreign personal representative who has complied with section 15-4-204 of this Part may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally. [I.C., § 15-4-205, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

<b>Am. Jur.</b> — 31 Am. Jur. 2d, Executors and Administrators, §§ 1063, 1073 et seq.	<b>C.J.S.</b> — 34 C.J.S., Executors and Administrators, § 1098 et seq.
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**15-4-206. Power of representatives in transition.** — The power of a domiciliary foreign personal representative under section 15-4-201 or 15-4-205 of this Part shall be exercised only if there is no administration or



application therefor pending in this state. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under section 15-4-205 of this Part, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this state. [I.C., § 15-4-206, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1070 et seq.

**15-4-207. Ancillary and other local administrations — Provisions governing.** — In respect to a nonresident decedent, the provisions of chapter 3 of this code govern (1) proceedings, if any, in a court of this state for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and (2) the status, powers, duties and liabilities of any local personal representative and the rights of claimants, purchasers, distributees and others in regard to a local administration. [I.C., § 15-4-207, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1070 et seq. **C.J.S.** — 34 C.J.S., Executors and Administrators, § 1098 et seq.

### COMMENT TO OFFICIAL TEXT

The purpose of this section is to direct attention to Article III [Chapter 3] for sections controlling local probates and administrations. See in particular, 1-301, 3-201, 3-202, 3-203, 3-307(a), 3-308, 3-611(b), 3-803(a), 3-815 and 3-816.

## PART 3. JURISDICTION OVER FOREIGN REPRESENTATIVES

**15-4-301. Jurisdiction by act of foreign personal representative.** — A foreign personal representative submits himself to the jurisdiction of the courts of this state in his capacity as a personal representative of the estate by:

- (a) filing authenticated copies of his appointment as provided in section 15-4-204 of this code;
  - (b) receiving payment of money or taking delivery of personal property under section 15-4-201 of this code; or
  - (c) doing any act as a personal representative in this state which would have given the state jurisdiction over him as an individual.
- Jurisdiction under subsection (b) of this section is limited to the money or value of personal property collected. [I.C., § 15-4-301, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 16, p. 510.]

STATUTORY NOTES

**Compiler’s Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

RESEARCH REFERENCES

- Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1074 et seq.
- C.J.S.** — 34 C.J.S., Executors and Administrators, § 1098 et seq.
- A.L.R.** — State statutes or rules of court conferring in personam jurisdiction over non-residents on the basis of isolated acts or transactions within state as applicable to personal representative of deceased nonresident. 19 A.L.R.3d 171.

COMMENT TO OFFICIAL TEXT

The words “courts of this state” are sufficient under federal legislation to include a federal court having jurisdiction in the adopting state.

A foreign personal representative appointed at the decedent’s domicile has priority for appointment in any local administration proceeding. See Section 3-203(g). Once appointed, a local personal representative remains subject to the jurisdiction of the appointing court under Section 3-602.

**15-4-302. Jurisdiction by act of decedent.** — In addition to jurisdiction conferred by section 15-4-301 of this Part, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death. [I.C., § 15-4-302, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1183 et seq.

**15-4-303. Service on foreign personal representative.** —

(a) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

(b) If service is made upon a foreign personal representative as provided in subsection (a) of this section, he shall be allowed at least thirty (30) days within which to appear or respond. [I.C., § 15-4-303, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1183 et seq.

### COMMENT TO OFFICIAL TEXT

The provision for ordinary mail as a substitute for registered or certified mail is provided because, under the present postal regulations, registered mail may not be available to reach certain addresses, 39 C.F.R. Sec.

51.3(c), and also certified mail may not be available as a process for service because of the method of delivery used, 39 C.F.R. Sec. 58.5(c) (rural delivery) and (d) (star route delivery.)

## PART 4. JUDGMENTS AND PERSONAL REPRESENTATIVE

**15-4-401. Effect of adjudication for or against personal representative.** — An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication. [I.C., § 15-4-401, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 1060 et seq.

**C.J.S.** — 34 C.J.S., Executors and Administrators, § 1098 et seq.

### COMMENT TO OFFICIAL TEXT

Adapted from Uniform Ancillary Administration of Estates Act, Section 8.

## CHAPTER 5

### PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

#### PART 1. GENERAL PROVISIONS

##### SECTION.

- 15-5-101. Definitions and use of terms.
- 15-5-102. Jurisdiction of subject matter — Consolidation of proceedings.
- 15-5-103. Facility of payment or delivery.
- 15-5-104. Delegation of powers by parent or guardian.
- 15-5-105. Evidence in proceedings involving veteran's benefits.
- 15-5-106. Copies of public records to be furnished.
- 15-5-107. Wrongful appropriation.

#### PART 2. GUARDIANS OF MINORS

- 15-5-201. Status of guardian of minor — General.

##### SECTION.

- 15-5-202. Testamentary appointment of guardian of minor.
- 15-5-203. Objection by minor of fourteen or older to testamentary appointment.
- 15-5-204. Court appointment of guardian of minor — Conditions for appointment.
- 15-5-205. Court appointment of guardian of minor — Venue.
- 15-5-206. Court appointment of guardian of minor — Qualifications — Priority of minor's nominee.
- 15-5-207. Court appointment of guardian of minor — Procedure.



## SECTION.

- 15-5-208. Consent to service by acceptance of appointment — Notice.
- 15-5-209. Powers and duties of guardian of minor.
- 15-5-210. Termination of appointment of guardian — General.
- 15-5-211. Proceedings subsequent to appointment — Venue.
- 15-5-212. Resignation or removal proceedings.
- 15-5-212A. Guardianships arising in connection with a proceeding under the child protective act.
- 15-5-213. De facto custodian.

## PART 3. GUARDIANS OF INCAPACITATED PERSONS

- 15-5-301. Testamentary appointment of guardian for incapacitated person or developmentally disabled person.
- 15-5-302. Venue.
- 15-5-303. Procedure for court appointment of a guardian of an incapacitated person.
- 15-5-304. Findings — Order of appointment.
- 15-5-305. Acceptance of appointment — Consent to jurisdiction.
- 15-5-306. Termination of guardianship for incapacitated person.
- 15-5-307. Removal or resignation of guardian — Termination of incapacity.
- 15-5-308. Visitor in guardianship proceeding.
- 15-5-309. Notices in guardianship proceedings.
- 15-5-310. Temporary guardians.
- 15-5-311. Who may be guardian — Priorities.
- 15-5-312. General powers and duties of guardian.
- 15-5-313. Proceedings subsequent to appointment — Venue.
- 15-5-314. Compensation and expenses.
- 15-5-315. Guardian ad litem — Duties.
- 15-5-316. Guardian ad litem — Rights and powers.

## PART 4. PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

- 15-5-401. Protective proceedings.
- 15-5-402. Protective proceedings — Jurisdiction of affairs of protected persons.
- 15-5-403. Venue.
- 15-5-404. Original petition for appointment or protective order.
- 15-5-405. Notice.
- 15-5-406. Protective proceedings — Request for notice — Interested person.
- 15-5-407. Procedure concerning hearing and order on original petition.

## SECTION.

- 15-5-407A. Temporary and emergency appointments.
- 15-5-408. Permissible court orders.
- 15-5-409. Protective arrangements and single transactions authorized.
- 15-5-409a. Compromise of disputed claim of minor — Procedure.
- 15-5-410. Who may be appointed conservator — Priorities.
- 15-5-411. Bond.
- 15-5-412. Terms and requirements of bonds.
- 15-5-413. Acceptance of appointment — Consent to jurisdiction.
- 15-5-414. Compensation and expenses.
- 15-5-415. Death, resignation or removal of conservator.
- 15-5-416. Petitions for orders subsequent to appointment.
- 15-5-417. General duty of conservator.
- 15-5-418. Inventory and records.
- 15-5-419. Accounts and reports.
- 15-5-420. Conservators — Title by appointment.
- 15-5-421. Recording of conservator's letters.
- 15-5-422. Sale, encumbrance or transaction involving conflict of interest — Voidable — Exceptions.
- 15-5-423. Persons dealing with conservators — Protection.
- 15-5-424. Powers of conservator in administration.
- 15-5-425. Distributive duties and powers of conservator.
- 15-5-426. Enlargement or limitation of powers of conservator.
- 15-5-427. Preservation of estate plan.
- 15-5-428. Claims against protected person — Enforcement.
- 15-5-429. Individual liability of conservator.
- 15-5-430. Termination of proceeding.
- 15-5-431. Payment of debt and delivery of property to foreign conservator without local proceedings.
- 15-5-432. [Repealed.]
- 15-5-433. Provisions for conservator of minor from age eighteen to age twenty-one.
- 15-5-434. Guardian ad litem — Duties.
- 15-5-435. Guardian ad litem — Rights and powers.

## PART 5. POWERS OF ATTORNEY

- 15-5-501 — 15-5-507. [Repealed.]
- 15-5-508. [Amended and Redesignated.]

## PART 6. BOARDS OF COMMUNITY GUARDIAN

- 15-5-601. Designation of boards of community guardian.
- 15-5-602. Board structure — Powers and duties.
- 15-5-603. Annual report.

## PART 1. GENERAL PROVISIONS

**15-5-101. Definitions and use of terms.** — Unless otherwise apparent from the context, in this code:

(a) “Incapacitated person” means any person who is impaired, except by minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, provided, that the term shall not refer to a developmentally disabled person as defined in section 66-402(5), Idaho Code, and provided further that:

(1) “Incapacity” means a legal, not a medical disability and shall be measured by function limitations and it shall be construed to mean or refer to any person who has suffered, is suffering, or is likely to suffer, substantial harm due to an inability to provide for his personal needs for food, clothing, shelter, health care, or safety, or an inability to manage his or her property or financial affairs;

(2) Inability to provide for personal needs or to manage property shall be evidenced by acts or occurrences, or statements which strongly indicate imminent acts or occurrences; material evidence of inability must have occurred within twelve (12) months prior to the filing of the petition for guardianship or conservatorship;

(3) Isolated instances of simple negligence or improvidence, lack of resources, or any act, occurrence, or statement, if that act, occurrence, or statement is the product of an informed judgment, shall not constitute evidence of inability to provide for personal needs or to manage property;

(4) “Informed judgment” means a choice made by a person who has the ability to make such a choice, and who makes it voluntarily after all relevant information necessary to making the decision has been provided, and who understands that he is free to choose or refuse any alternative available and who clearly indicates or expresses the outcome of his choice;

(b) A “protective proceeding” is a proceeding under the provisions of section 15-5-401, Idaho Code, to determine that a person cannot effectively manage or apply his estate to necessary ends, either because he lacks the ability or is otherwise inconvenienced, or because he is a minor, and to secure administration of his estate by a conservator or other appropriate relief;

(c) A “protected person” is a minor or other person for whom a conservator has been appointed or other protective order has been made;

(d) A “ward” is a person for whom a guardian has been appointed. A “minor ward” is a minor for whom a guardian has been appointed solely because of minority. [I.C., § 15-5-101, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 59, § 2, p. 91; am. 1989, ch. 241, § 1, p. 587; am. 1997, ch. 210, § 1, p. 627; am. 1999, ch. 293, § 3, p. 732; am. 2000, ch. 180, § 1, p. 448.]

## STATUTORY NOTES

**Cross References.** — Adult abuse, neglect and exploitation, § 39-5301 et seq.  
“Mentally ill” defined, § 66-317.

Other terms defined, § 15-1-201.  
**Compiler’s Notes.** — The words “this code” refer to the Uniform Probate Code, as



adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### JUDICIAL DECISIONS

**Cited in:** *Landis v. DeLaRosa*, 137 Idaho 405, 49 P.3d 410 (2002).

### RESEARCH REFERENCES

**A.L.R.** — Amount of attorneys' compensation in matters involving guardianship and trusts. 57 A.L.R.3d 550.

Guardian's position as joint tenant or successor to property in ward's estate as rais-

ing conflict of interest. 69 A.L.R.3d 1198.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator or trustee of mentally or physically incompetent testator. 84 A.L.R.4th 462.

### COMMENT TO OFFICIAL TEXT

#### [General comment to §§ 15-5-101 — 15-5-502.]

Article V [Chapter 5], entitled "Protection of Persons Under Disability and Their Property" embodies separate systems of guardianship to protect persons of minors and mental incompetents. It also includes provisions for a type of power of attorney that does not terminate on disability of the principal which may be used by adults approaching senility or incompetence to avoid the necessity for other kinds of protective regimes. Finally, Part 4 of the Article [Chapter] offers a system of protective proceedings, including conservatorships, to provide for the management of substantial aggregations of property of persons who are, for one reason or another, including minority and mental incompetence, unable to manage their own property.

It should be emphasized that the Article [Chapter] contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize arrangements which become necessary for care of persons or their property. The power of attorney which confers authority notwithstanding later incompetence is one example of the former. Another is a facility of payment provision which permits relatively small sums owed to a minor to be paid whether or not there is a guardian or other official who has been designated to act for the minor. A new device tending to simplify necessary protective proceedings, is found in provisions in Part 4 which permit a judge to make appropriate orders concerning the property of a disabled person without appointing a fiduciary.

The highspots of the several parts of Article V [Chapter 5], considered in somewhat more detail, include the following:

(a) The facility of payment clause, which is

Section 5-103 in Part 1, permits one owing up to \$5,000 per year to a minor to be validly discharged by payment to the minor, if he is over eighteen or married, to the minor's parent or grandparent or other adult with whom the minor resides, to a guardian, or by deposit in an account in the name of the minor.

(b) A provision in Part 2 permits the surviving parent of a minor to designate a guardian by will. A similar provision in Part 3 authorizes a parent or spouse to designate a guardian for an incapacitated person by will. Such designation becomes effective upon probate of the will and the filing of an acceptance by the guardian. Thereafter the status of guardian and ward arises. It is like guardianship of the person, rather than of estate. It is described as a parental relationship without the parental obligation of support. The relationship follows the guardian and ward and is properly recognized and implemented, as and when necessary, by the courts of any jurisdiction where these persons may be located. No requirement of periodic reports or accounts is imposed on a testamentary guardian. The question of his proper expenditure of the small sums which he may receive for the ward is left to be settled by the guardian and ward after the ward attains full age. If the amounts involved becomes more than the guardian cares to be responsible for on this basis, he or any other interested person may seek the appointment of a property manager who is called a "conservator" by the Code. The guardian may be eligible to be appointed to this position.

Part 2 also permits a testamentary guardian of a minor to receive and expend sums payable to the minor for the minor's support and education without court order. He may not pay himself for services, however, and is under a duty to deposit excess funds, or to seek a suitable property-protection order if



other management is needed.

(c) A parent or guardian is permitted to delegate his authority for short periods as necessitated by anticipated absence or incapacity.

(d) As previously mentioned, Part 4 of the Article [Chapter] deals with protective proceedings designed to permit substantial property interests of minors and others unable properly to manage their own affairs to be controlled by court order or managed by a conservator appointed by the court. The causes for inability of owner-management that are listed by the statute are quite broad. Technical incompetency is but one of several reasons why one may be unable to manage his affairs. See Section 5-401 (2) [15-5-401(b)]. The draftsmen's view was that reliance should be placed on the fact that the court applying the statute would be a full power court and on the various procedural safeguards, including a right to jury trial, to protect against unwise use of the proceedings, rather than to attempt to state and rely upon a narrow or technical test of lack of ability.

Section 5-409 is important, for it makes it clear that a court entertaining a protective proceeding has full power, through its orders, to do anything the protected person himself might have done if not disabled. Another provision broadens the form of relief so that the court may handle a single transaction, like renewal of a mortgage, or a sale and related investment of proceeds, which is recommended in respect to the affairs of a protected person directly by its orders rather than through the appointment of a conservator.

(e) If a conservator is appointed, provisions in Part 4 of the draft give him broad powers of management that may be exercised without a court order. On the other hand, provision is made for restricting the managerial or distribution powers of a conservator, provided notation of the restriction appears on his letters of appointment. Unless restricted, the fiduciary may be able to distribute and end the arrangement without court order if he can meet the terms of the Act. Among other kinds of expenditures and disbursements authorized, payments for the support and education of the protected person as determined by a guardian of the protected person, if any, or by the conservator, if there is no guardian, are approved. Also, certain payments for the support of dependents of the protected person are approved by the Code and hence would require no special approval.

(f) Other provisions in Part 4 round out the relationship of protective proceedings to creditors of the protected person and persons who

deal with a conservator. Claims are handled by the conservator who is given a fiduciary responsibility to claimants and suitable discretion concerning allowance. If questions arise, the appointing court has all needed power to deal with disputes with creditors. The draft changes the common law rule that contracts of a guardian are his personal responsibility. A conservator is not liable personally on contracts made for the estate unless he agrees to such liability. A section buttresses the managerial powers given to conservator by protecting all persons who deal with them.

(g) Another section seeks to reduce the importance of state lines in respect to the authority of conservators by permitting appointees of foreign courts to act locally. Also, it follows the pattern of Article III [Chapter 3] dealing with ancillary administration of decedents' estates by giving the conservator appointed at the domicile of the protected person priority for appointment locally in case local administration of a protected person's assets becomes necessary.

(h) The many states which have adopted the Uniform Veterans Guardianship Act now have two systems for protection of the property of minors and mental incompetents, one of which applies if the property was derived, in whole or in part, from benefits paid by the Veterans Administration and its minor or incompetent owner is or has been a beneficiary of the Veterans Administration, and the other of which applies to all other property. It is sometimes difficult to ascertain whether a person has ever received a benefit from the Veterans Administration and commonly impossible to determine whether property was derived in part from benefits paid by the Veterans Administration. Part 4 would provide a single system for the protection of property of minors and others unable to manage their own property, thus superseding the Uniform Veterans Guardianship Act. It would preserve the right of the Veterans Administration to appear in protective proceedings involving the property of its beneficiaries and would permit the imposition of the same safeguards provided by the superseded Uniform Veterans Guardianship Act.

#### [Comment to § 15-5-101.]

"Conservator," "estate," "guardian" and "minor," and other terms having relevance to Article V [Chapter 5], are defined in 1-201. "Disability" as defined in Section 1-201(9) [15-1-201(13)] keys to an adjudication for the causes listed in Section 5-401. The definition of "incapacitated" on the other hand contains the bases for appointment of a guardian under Section 5-303.

**15-5-102. Jurisdiction of subject matter — Consolidation of proceedings.** — When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated. [I.C., § 15-5-102, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — “Court” defined, § 15-1-201.  
Protective proceedings, § 15-5-401 et seq.  
Guardianship proceedings, § 15-5-201 et seq.

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 31 et seq.  
**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 13-15, 228, 258, 259.

**15-5-103. Facility of payment or delivery.** — Any person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding ten thousand dollars (\$10,000) per annum, by paying or delivering the money or property to, (1) the minor, if he has attained the age of eighteen (18) years or is married; (2) any person having the care and custody of the minor with whom the minor resides; (3) a guardian of the minor; or (4) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor. This section does not apply if the person making payment or delivery has actual knowledge that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending. The persons, other than the minor or any financial institution under (4) of this section, receiving money or property for a minor, are obligated to apply the money to the support and education of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor’s support. Any excess sums shall be preserved for future support of the minor and any balance not so used and any property received for the minor must be turned over to the minor when he attains majority. Persons who pay or deliver in accordance with provisions of this section are not responsible for the proper application thereof. [I.C., § 15-5-103, as added by 1971, ch. 111, § 1, p. 233; am. 1989, ch. 79, § 1, p. 140.]

### STATUTORY NOTES

**Cross References.** — “Child” defined, § 16-1602.  
Guardians of minors, § 15-5-201 et seq.  
“Minor” defined, § 32-101.

### RESEARCH REFERENCES

**Am. Jur.** — 31 Am. Jur. 2d, Executors and Administrators, § 22.



## COMMENT TO OFFICIAL TEXT

Where a minor has only a small amount of property, it would be wasteful to require protective proceedings to deal with the property. This section makes it possible for other persons, such as the guardian, to handle the less complicated property affairs of the ward. Protective proceedings, including the possible establishment of conservatorship, will be sought where substantial property is involved.

This section does not go as far as many facility of payment provisions found in trust

instruments which usually permit application of sums due minor beneficiary to any expense or charge for the minor. It was felt that a grant of so large an area of discretion to any category of person who might owe funds to a minor would be unwise. Nonetheless, the section as drafted should reduce the need for trust facility of payment provision somewhat, while extending opportunities to insurance companies and other debtors to minors for relatively simple methods of gaining discharge.

**15-5-104. Delegation of powers by parent or guardian.** — A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding six (6) months, or in the case of military personnel serving beyond the territorial limits of the United States for a period not exceeding twelve (12) months, any of the parent's or guardian's powers regarding care, custody, or property of the minor or ward including, but not limited to, powers for medical care and educational care of the minor or ward, except the parent's or guardian's power to consent to marriage or adoption of a minor or ward. The delegation for a minor to a grandparent of the minor, or to a sibling of the minor, or to a sibling of either parent of the minor, shall continue in effect until the time period, or date, or condition set forth in the power of attorney for automatic expiration of the power of attorney occurs. If the power of attorney does not provide a time period, or date, or condition for automatic expiration of the power, the power of attorney shall continue in effect for a period of three (3) years. The power may be revoked prior to the expiration of the three (3) year period, or prior to the time period, or date, or condition for automatic expiration, in a writing delivered to the grandparent or sibling by the delegating parent or guardian. The power of attorney does not need to be notarized or recorded to be valid. However, if the power is recorded, any revocation of the power by a writing must also be recorded before the revocation is effective. [I.C., § 15-5-104, as added by 1971, ch. 111, § 1, p. 233; am. 1991, ch. 29, § 1, p. 58; am. 2003, ch. 64, § 1, p. 210.]

## STATUTORY NOTES

**Cross References.** — Guardians of incapacitated persons, § 15-5-301 et seq.  
Guardians of minors, § 15-5-201 et seq.  
Powers of attorney, § 15-12-101 et seq.

**Effective Dates.** — Section 2 of S.L. 1991, ch. 29, declared an emergency. Approved March 7, 1991.

## JUDICIAL DECISIONS

**Visitation.**

Father deployed to Iraq could delegate his right to visitation with his daughter to his

parents. *Webb v. Webb*, 143 Idaho 521, 148 P.3d 1267 (2006).



RESEARCH REFERENCES

**Am. Jur.** — 3 Am. Jur. 2d, Agency, § 21 et seq.  
**C.J.S.** — 2A C.J.S., Agency, § 32 et seq.

COMMENT TO OFFICIAL TEXT

This section permits a temporary delegation of parental powers. For example, parents (or guardian) of a minor plan to be out of the country for several months. They wish to empower a close relative (an uncle, e.g.) to take any necessary action regarding the child while they are away. Using this section, they could execute an appropriate power of attor-

ney giving the uncle custody and power to consent. Then, if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting. The section is designed to reduce problems relating to consents for emergency treatment.

**15-5-105. Evidence in proceedings involving veteran’s benefits.** — If benefits derived from the United States through the veteran’s administration are involved in any proceeding under this chapter, a certificate of the administrator or his authorized representative shall be prima facie evidence of the necessity of appointment of a guardian or conservator or both if:

(a) It sets forth the age of the minor involved in the proceeding as shown by the records of the veterans administration and the fact that appointment is a condition precedent to payment of any moneys;

(b) It sets forth the fact that a purportedly incapacitated person involved in the proceeding has been rated incompetent by the veterans administration upon examination pursuant to the laws governing such administration and that appointment of a guardian is a condition precedent to payment of any moneys due such incapacitated person. [I.C., § 15-5-105, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 77 Am. Jur. 2d, Veterans and Veterans’ Laws, § 42 et seq.      **C.J.S.** — 57 C.J.S., Mental Health, § 202 et seq.

**15-5-106. Copies of public records to be furnished.** — When a copy of any public record is required by the veterans administration to be used in determining the eligibility of any persons to participate in benefits made available by the veterans administration, the official custodian of such public records shall without charge provide the applicant for such benefits or any person acting on his behalf or the authorized representative of the veterans administration with a certified copy of such record. [I.C., § 15-5-106, as added by 1971, ch. 111, § 1, p. 233.]

**15-5-107. Wrongful appropriation.** — Upon the petition of anyone interested in the welfare of the ward, anyone suspected of having concealed, embezzled or conveyed away any of the moneys, goods or effects belonging to the ward or his estate may be ordered by the court to appear and be examined on oath and held to account upon such matters and for such property. [I.C., § 15-5-107, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Examination of alleged embezzler by public administrator, § 14-109.

### PART 2. GUARDIANS OF MINORS

**15-5-201. Status of guardian of minor — General.** — A person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward. [I.C., § 15-5-201, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — “Child” defined, § 16-1602. Persons who may give consent to care for others, § 39-4504.  
“Minor” defined, § 32-101.

## JUDICIAL DECISIONS

### Appointment of Grandparents.

The magistrate’s order appointing the grandparents coguardians of two minor children was a binding adjudication that the best

interests of the minor children would be served by the requested appointment. *Revello v. Revello*, 100 Idaho 829, 606 P.2d 933 (1979).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Abandonment of right.  
Parent’s right.

### Abandonment of Right.

A father who, after a divorce in which custody of his children was given to his wife and after the wife’s remarriage and removal to the state of Connecticut, failed to make substantial payments for their support, to visit them, or to make sufficient inquiry to learn of their whereabouts was deemed to have abandoned such children and was not entitled to their custody after the death of their mother. *Clark v. Jelinek*, 90 Idaho 592, 414 P.2d 892 (1966).

Nonsupport does not necessarily of itself constitute abandonment and, where a father’s failure to contribute to the support of his child after a divorce was with the consent of the mother and where the father maintained a continuous and abiding interest in the child, manifested by visitation and by seeking his custody immediately upon the death of the mother, the court did not err in failing to find that he had abandoned the child. *Blankenship v. Brookshier*, 91 Idaho 317, 420 P.2d 800 (1966).

### Parent’s Right.

In a proceeding to determine custody of a child between parent and third party, the court should consider the following factors: (1) interest of the parents, (2) interest of third party caring for the child, and (3) interest of the child. In *re Altmiller*, 76 Idaho 521, 285 P.2d 1064 (1955).

In a proceeding of habeas corpus filed by father to obtain custody of child who was in the home of the grandmother, a determination in favor of the father based on ground that he was a fit person to take care of his child even though he had not supported child for five years due to sickness and insufficient funds, was set aside by the Supreme Court on the ground that father was not in a position to adequately care for the child whereas the grandmother had given the child a comfortable home to which the child was much attached. *Application of Altmiller*, 76 Idaho 521, 285 P.2d 1064 (1955).

If the parent is competent to transact his or her own business and is not otherwise unsuit-

able, the custody of the child is not to be given to another, even though such other may be a more suitable person. *Spaulding v. Children's Home Finding & Aid Soc'y*, 89 Idaho 10, 402 P.2d 52 (1965).

RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 1.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 3.

**15-5-202. Testamentary appointment of guardian of minor.** — A parent of a minor may appoint a guardian of an unmarried minor by will, subject to the right of the minor under section 15-5-203, Idaho Code. The termination of parental rights of a parent as to the minor shall also terminate the right of that parent to appoint a guardian for the minor. A testamentary appointment becomes effective upon the filing of the guardian's acceptance in the court in which the will is probated, if, at the decedent's death, no parent of the minor was alive who had a right to appoint a guardian for the minor. This state recognizes a testamentary appointment effected by the guardian's acceptance under a will probated in another state which is the testator's domicile. Written notice of acceptance of the appointment must be given by the guardian to the minor and to the person having his care or to his nearest relation immediately upon acceptance of appointment. [I.C., § 15-5-202, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 17, p. 510; am. 2002, ch. 233, § 2, p. 666; am. 2006, ch. 183, § 1, p. 582.]

STATUTORY NOTES

**Cross References.** — Testamentary appointment of guardian for incapacitated person, § 15-5-301.

**Amendments.** — The\* 2006 amendment, by ch. 183, rewrote this section, which formerly read: "The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under section 15-5-203, Idaho Code, a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated, if before acceptance, both parents are dead. If both parents are dead, an effective appointment by the parent who died later has priority. This state recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in another state which is the testator's domicile. Written notice of acceptance of the appointment must be given by the guardian to the minor and to the person having his care or to his nearest adult relation immediately upon acceptance of appointment."

JUDICIAL DECISIONS

**Unknown Parent.**  
Guardians failed to demonstrate that the father of the children was dead or had been adjudged incapacitated; argument that a person was incapacitated simply by being unknown was not supported by the probate code. *Landis v. DeLaRosa*, 137 Idaho 405, 49 P.3d 410 (2002).

DECISIONS UNDER PRIOR LAW  
ANALYSIS

Qualification of guardian.  
Waiver of mother's consent.



**Qualification of Guardian.**

For a testamentary guardian to "qualify," the appointment under the will must be approved and confirmed by the proper court. *Rotter v. Rotter*, 93 Idaho 462, 463 P.2d 928 (1970).

**Waiver of Mother's Consent.**

Appointment of testamentary guardian under will of father requires written consent of

mother, and such consent may be waived by mother expressly consenting to the appointment of another person as guardian, and such waiver extends only to the specific party in such consent to appointment. *Rotter v. Rotter*, 93 Idaho 462, 463 P.2d 928 (1970).

**RESEARCH REFERENCES**

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 11.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 16 et seq.

**15-5-203. Objection by minor of fourteen or older to testamentary appointment.** — A minor of fourteen (14) or more years may prevent an appointment of his testamentary guardian from becoming effective, or may cause a previously accepted appointment to terminate, by filing with the court in which the will is probated a written objection to the appointment before it is accepted or within thirty (30) days after notice of its acceptance. An objection may be withdrawn. An objection does not preclude appointment by the court in a proper proceeding of the testamentary nominee, or any other suitable person. [I.C., § 15-5-203, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 18, p. 510.]

**RESEARCH REFERENCES**

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 19, 21, 43.

**A.L.R.** — Who is minor's next of kin for guardianship purposes. 63 A.L.R.3d 813.

**15-5-204. Court appointment of guardian of minor — Conditions for appointment.** — The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated by prior court order or upon a finding that the child has been neglected, abused, abandoned, or whose parents are unable to provide a stable home environment. "Abandoned" means the failure of the parent to maintain a normal parental relationship with the child including, but not limited to, reasonable support or regular contact. Failure to maintain a normal parental relationship with the child without just cause for a period of six (6) months shall constitute prima facie evidence of abandonment. In all cases, the court shall consider the best interests of the child as the primary factor in the determination whether to appoint, and whom to appoint, as a guardian for such child. In determining the choice of a guardian for an unmarried minor, the advanced age or disability of a potential guardian shall not, in and of itself, be used as a criterion of the suitability of the potential guardian so long as the potential guardian is otherwise suitable. A guardian appointed by will as provided in section 15-5-202, Idaho Code, whose appointment has not been prevented or nullified under section 15-5-203, Idaho Code, has priority over any guardian who may be appointed by the court but the court may proceed with an appointment nonetheless upon a finding that the testamentary guardian has failed to accept the testamentary appointment within thirty (30) days

after notice of the guardianship proceeding. [I.C., § 15-5-204, as added by 1971, ch. 111, § 1, p. 233; am. 1999, ch. 123, § 1, p. 360; am. 2002, ch. 233, § 3, p. 666.]

## JUDICIAL DECISIONS

### Minor's Nomination.

All of the criteria set forth in this section and § 15-5-207 must be satisfied before granting any application for appointment of a guardian; the mere fact that the application is

coupled with the minor's nomination does not obviate the need to comply with these statutes. *Diamond v. Diamond*, 109 Idaho 409, 707 P.2d 520 (Ct. App. 1985).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Jurisdiction.

Parental rights.

Suspension of parental rights.

### Jurisdiction.

The courts of this state have jurisdiction to appoint a guardian for minors domiciled in the state, and, after having made such appointment, the courts retain jurisdiction for all purposes in connection therewith until the guardian's accounts are rendered and he is legally discharged. *In re Brady*, 10 Idaho 366, 79 P. 75 (1904).

### Parental Rights.

While parent being competent and not unsuitable is absolutely entitled to the guardianship of minor child, yet the right of parent may be abandoned or forfeited by act or conduct on his part and, if his right is not clear, the best interest of the child will govern decision of the court. *Andrino v. Yates*, 12 Idaho 618, 87 P. 787 (1906).

It is only where the legal right of the parent to custody of his child is not clear that child can be committed to the custody of another on ground of welfare. If parent is competent to transact his or her own business and is not otherwise unsuitable, custody of the child is not to be given to another even though such other may be a more suitable person. *In re Crocheron's Estate*, 16 Idaho 441, 101 P. 741 (1909); *Jain v. Priest*, 30 Idaho 273, 164 P. 364 (1917); *McChesney v. Geiger*, 35 Idaho 69, 204 P. 658 (1922); *Schiller v. Douglas*, 48 Idaho 803, 285 P. 1021 (1930).

A finding that a father is a man of intemperate habits and lacking in integrity is not sufficient to deprive him of guardianship of his minor children. *In re Crocheron's Estate*, 16 Idaho 441, 101 P. 741 (1909).

Parents, when suitable, are absolutely entitled to guardianship of their minor children and surrender of such right may be made only in the manner provided by law. *Ex parte Martin*, 29 Idaho 716, 161 P. 573 (1916).

As between parent and grandparent mere finding that appointment of latter is for best interest of child is insufficient. There must be finding that parent is unfit to have control. *Piatt v. Piatt*, 32 Idaho 407, 184 P. 470 (1919); *Schiller v. Douglas*, 48 Idaho 803, 285 P. 1021 (1930).

Fact of parentage having been established, it devolves upon contestants to show forfeiture of right of guardianship or at least that parent is unsuitable person. *Schiller v. Douglas*, 48 Idaho 803, 285 P. 1021 (1930).

### Suspension of Parental Rights.

The magistrate has authority under this section to consider, as an alternative to formal termination of parental rights, whether suspension of parental rights may exist because of special circumstances. *Diamond v. Diamond*, 109 Idaho 409, 707 P.2d 520 (Ct. App. 1985).

"Suspended by circumstances" must contemplate some set of circumstances which deprives a parent of the ability to accept the rights and responsibilities of parenthood. *Irwin v. Celeya*, 124 Idaho 888, 865 P.2d 979 (1993).

While there may have been evidence to support the magistrate's finding that the natural mother's parental rights were temporarily suspended by circumstances, those circumstances no longer existed at a permanent guardianship hearing where the natural mother made it clear that she no longer desired to leave her children with the non-relative guardians and that she was willing and capable of caring for them; therefore, the magistrate erred in concluding that natural mother's parental rights were still suspended by circumstances and in proceeding with the permanent guardianship. *Irwin v. Celeya*, 124 Idaho 888, 865 P.2d 979 (1993).

## RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 19 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 28 et seq.

**A.L.R.** — Right of putative father to custody of illegitimate child. 45 A.L.R.3d 216.

Who is minor's next of kin for guardianship purposes. 63 A.L.R.3d 813.

## COMMENT TO OFFICIAL TEXT

The words "all parental rights of custody" are to be read with Sections 5-201 and 5-209 which give testamentary and court-appointed guardians of minors certain parental rights respecting the minor. Hence, no authority to appoint a guardian for a minor exists if a testamentary guardian has accepted an effective appointment by will. The purpose of this

restriction is to support and encourage testamentary appointments which may occur without judicial act. If a testamentary guardian proves to be unsatisfactory, removal proceedings as provided in Section 5-211 may be used if the objection device of Section 5-203 is unavailable.

**15-5-205. Court appointment of guardian of minor — Venue.** — The venue for guardianship proceedings for a minor is in the place where the minor resides or is present. [I.C., § 15-2-205, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Venue for guardianship proceedings for incapacitated persons, § 15-5-302.

## COMMENT TO OFFICIAL TEXT

Section 1-303 provides for conflicts of venue and for transfer of venue.

**15-5-206. Court appointment of guardian of minor — Qualifications — Priority of minor's nominee.** — The court may appoint as guardian any person whose appointment would be in the best interests of the minor. The court shall appoint a person nominated by the minor, if the minor is fourteen (14) years of age or older, unless the court finds the appointment contrary to the best interests of the minor. [I.C., § 15-5-206, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

**Cited in:** *Diamond v. Diamond*, 109 Idaho 409, 707 P.2d 520 (Ct. App. 1985).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

In general.  
Best interests of minor.

**In General.**

In tableau of habeas corpus, parties are in foreground and children in background; but

in tableau of guardianship, arrangement is reversed — child is principal figure and applicants and caveators are secondary and subor-



minate. *Schiller v. Douglas*, 48 Idaho 803, 285 P. 1021 (1930).

#### **Best Interests of Minor.**

Where child has resided with its aunt from the time it was two and one-half years old until it was nearly twelve years of age, without having seen its mother during that time, and conditions are such, in view of the conduct of the mother and absence of parental care on her part during that period, that the custody cannot be changed without endangering the happiness and welfare of the child, the

mother will be deemed "unsuitable" to have the custody of the child and the child will be left with its aunt, notwithstanding an application of the mother for its custody. *Andrino v. Yates*, 12 Idaho 618, 87 P. 787 (1906).

While best interests of child is of paramount importance, it is not wholly controlling and not the only matter to be considered in determining custody of child either in guardianship or habeas corpus proceedings. *Schiller v. Douglas*, 48 Idaho 803, 285 P. 1021 (1930).

### **RESEARCH REFERENCES**

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 38 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 28 et seq.

**A.L.R.** — Who is minor's next of kin for guardianship purposes. 63 A.L.R.3d 813.

### **COMMENT TO OFFICIAL TEXT**

Rather than provide for priorities among various classes of relatives, it was felt that the only priority should be for the person nominated by the minor. The important point is to locate someone whose appointment will be in the best interests of the minor. If there is contention among relatives over who should be named, it is not likely that a statutory priority keyed to degrees of kinship would help resolve the matter. For example, if the argument involved a squabble between relatives of the child's father and relatives of its mother, priority in terms of degrees of kinship would be useless.

Guardianships under this Code are not likely to be attractive positions for persons who are more interested in handling a minor's estate than in his personal well being. An order of a court having equity power is necessary if the guardian is to receive payment for services where there is no conservator for the minor's estate. Also, the powers of management of a ward's estate conferred on a guardian are restricted so that if a substantial estate is involved, a conservator will be needed to handle the financial matters.

#### **15-5-207. Court appointment of guardian of minor — Procedure.**

— (1) Proceedings for the appointment of a guardian may be initiated by any relative of the minor, the minor if he is fourteen (14) years of age, a de facto custodian of the minor, or any person interested in the welfare of the minor.

(2) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given by the petitioner in the manner prescribed by section 15-1-401 of this code to:

- (a) The minor, if he is fourteen (14) or more years of age;
- (b) The person who has had the principal care and custody of the minor during the sixty (60) days preceding the date of the petition;
- (c) The de facto custodian of the minor, if any; and
- (d) Any living parent of the minor; provided however, that the court may waive notice to a living parent of the minor who is, or is alleged to be, the father of the minor if:

- (i) The father was never married to the mother of the minor and has failed to register his paternity as provided in section 16-1504(4), Idaho Code; or

(ii) The court has been shown to its satisfaction circumstances that would allow the entry of an order of termination of parental rights pursuant to section 16-2005, Idaho Code, even though termination of parental rights is not being sought as to such father.

(3) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 15-5-204 of this part have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings, or make any other disposition of the matter that will best serve the interest of the minor.

(4) If necessary, the court may appoint a temporary guardian, with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not last longer than six (6) months.

(5) The court shall appoint an attorney to represent the minor if the court determines that the minor possesses sufficient maturity to direct the attorney. If the court finds that the minor is not mature enough to direct an attorney, the court shall appoint a guardian ad litem for the minor. The court may decline to appoint an attorney or guardian ad litem if it finds in writing that such appointment is not necessary to serve the best interests of the minor or if the Idaho department of health and welfare has legal custody of the child.

(6) Letters of guardianship must indicate whether the guardian was appointed by will or by court order. [I.C., § 15-5-207, as added by 1971, ch. 111, § 1, p. 233; am. 2004, ch. 145, § 1, p. 475; am. 2005, ch. 113, § 1, p. 364; am. 2006, ch. 180, § 1, p. 559.]

## STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 180, redesignated the subsections; added the proviso at the end of introductory paragraph of present subsection (2)(d); and added present subsections (2)(d)(i) and (ii).

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

## JUDICIAL DECISIONS

### ANALYSIS

Appointment of grandparents.  
Minor's nomination.  
Parental rights.

### Appointment of Grandparents.

The magistrate's order appointing the grandparents coguardians of two minor children was a binding adjudication that the best interests of the minor children would be served by the requested appointment. *Revello v. Revello*, 100 Idaho 829, 606 P.2d 933 (1979).

### Minor's Nomination.

All of the criteria set forth in this section and § 15-5-204 must be satisfied before granting any application for appointment of a

guardian; the mere fact that the application is coupled with the minor's nomination does not obviate the need to comply with these statutes. *Diamond v. Diamond*, 109 Idaho 409, 707 P.2d 520 (Ct. App. 1985).

### Parental Rights.

While there may have been evidence to support the magistrate's finding that the natural mother's parental rights were temporarily suspended by circumstances, those circumstances no longer existed at a permanent

guardianship hearing where the natural mother made it clear that she no longer desired to leave her children with the non-relative guardians and that she was willing and capable of caring for them; therefore, the magistrate erred in concluding that natural mother's parental rights were still suspended

by circumstances and in proceeding with the permanent guardianship. *Irwin v. Celeya*, 124 Idaho 888, 865 P.2d 979 (1993) (decided prior to 1999 amendment of § 15-5-204).

**Cited in:** *State v. Nath*, 137 Idaho 712, 52 P.3d 857 (2002).

**15-5-208. Consent to service by acceptance of appointment — Notice.** — By accepting a testamentary or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian, or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner. [I.C., § 15-5-208, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Acceptance of appointment and consent to jurisdiction by guardian of incapacitated person, § 15-5-305.

### JUDICIAL DECISIONS

#### **Personal Jurisdiction of Magistrate.**

By accepting the appointment as conservator of her father's estate, daughter submitted personally to the jurisdiction of the court in any proceeding relating to the estate that might have been instituted by any interested

person. The magistrate also had personal jurisdiction over the daughter by virtue of her acceptance of the appointment as guardian. *East v. West One Bank*, 120 Idaho 226, 815 P.2d 35 (Ct. App. 1991), cert. denied, 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed. 2d 571 (1992).

### RESEARCH REFERENCES

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 28 et seq.

### COMMENT TO OFFICIAL TEXT

The "long-arm" principle behind this section is well established. It seems desirable that the Court in which acceptance is filed be able to serve its process on the guardian wherever he has moved. The continuing interest of that court in the welfare of the minor is ample to justify this provision. The consent to

service is real rather than fictional in the guardianship situation, where the guardian acts voluntarily in filing acceptance. It is probable that the form of acceptance will expressly embody the provisions of this section, although the statute does not expressly require this.

**15-5-209. Powers and duties of guardian of minor.** — A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons by reason of the parental relationship for acts of the ward. In particular, and without qualifying the foregoing, a guardian has the following powers and duties:



(a) He must take reasonable care of his ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.

(b) He may receive money payable for the support of the ward to the ward's parent, guardian or custodian under the terms of any statutory benefit or insurance system, or any private contract, devise, trust, conservatorship or custodianship. He also may receive money or property of the ward paid or delivered by virtue of section 15-5-103 of this code. Any sums so received shall be applied to the ward's current needs for support, care and education. He must exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case excess shall be paid over at least annually to the conservator. Sums so received by the guardian are not to be used for compensation for his services except as approved by order of court or as determined by a duly appointed conservator other than the guardian. A guardian may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

(c) The guardian is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless it would have been illegal for a parent to have consented. A guardian may consent to the marriage or adoption of his ward.

(d) A guardian must report the condition of his ward and of the ward's estate which has been subject to his possession or control, as ordered by court on petition of any person interested in the minor's welfare or as required by court rule. [I.C., § 15-5-209, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Powers and duties of guardian of incapacitated person, § 15-5-312.

**Compiler's Notes.** — The words "this

code" refer to the Uniform Probate Code as adopted by S.L. 1971, ch. 111, § 1, compiled in chapters 1 through 7 of this title.

## JUDICIAL DECISIONS

### ANALYSIS

Custody of ward.  
Grandparents.

#### **Custody of Ward.**

Unless it is otherwise indicated in the order of guardianship, a court appointed guardian of a minor child is entitled to the custody of the ward. *Revello v. Revello*, 100 Idaho 829, 606 P.2d 933 (1979).

#### **Grandparents.**

Grandparents' appeal from an order denying them grandparent custody, under § 32-

717(3), was moot because (1) the grandparents were appointed as their grandson's guardians; (2) as guardians, the grandparents had custody of their grandson; (3) until the guardianship was terminated, a guardian's right to custody of a minor was superior to that of the minor's parent, under this section; and (4) granting the grandparents custody under § 32-717(3) would not have given them any greater rights with respect to their grand-

son than they already had as his guardians.  
Doe v. Doe (In re Doe), 145 Idaho 337, 179 P.3d 300 (2008).

**Cited in:** Diamond v. Diamond, 109 Idaho 409, 707 P.2d 520 (Ct. App. 1985).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Adoption agency.  
Application.  
Best interest of ward.  
Grant of power.  
Sale of unproductive assets.  
Testamentary guardian.

**Adoption Agency.**

Where the custody of a child had never been legally surrendered to Children’s Home Society, such society was without authority to exercise any right or control over child, or to act as its guardian and consent to child’s adoption. Ex parte Martin, 29 Idaho 716, 161 P. 573 (1916).

**Application.**

Whether statute allowing guardian to sell property of the ward is limited to cases where income is insufficient to maintain and educate the ward, as specified by the statute, depends upon the intent of the legislature. Willard v. First Sec. Bank, 69 Idaho 265, 206 P.2d 770 (1949).

**Best Interest of Ward.**

Where guardian was notified by corporation in which ward had stock that capitalization was to be increased, and there was not sufficient income in the estate to purchase the new stock sale by guardian of stock held by the ward in the corporation was authorized, though there was no showing that income in estate was not sufficient to maintain ward, since legislature did not intend to limit power of sale of guardian, but to grant power of sale, where it was to the best interest of the ward

to sell the stock. Willard v. First Sec. Bank, 69 Idaho 265, 206 P.2d 770 (1949).

**Grant of Power.**

Legislature by passing statute providing that guardians may sell property of the ward, if income is insufficient to maintain and educate ward, did not intend to limit sales by guardians, but simply intended a grant of power. Willard v. First Sec. Bank, 69 Idaho 265, 206 P.2d 770 (1949).

**Sale of Unproductive Assets.**

The guardian’s sale of real estate was justified by the court’s finding that the operation of the property was causing an invasion of the principal rather than showing a profit to the ward’s estate. Knudson v. Bank of Idaho, 91 Idaho 923, 435 P.2d 348 (1967).

**Testamentary Guardian.**

A testamentary guardian, who applied to be and was appointed as the general guardian of the persons and estates of the minor children of decedent, had authority to conduct litigation over the probate of decedent’s will and to incur expenses in connection therewith even though he failed to establish its validity, where the will appeared to be legal and fair on its face. In re Brady, 10 Idaho 366, 79 P. 75 (1904).

RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, §§ 86 et seq., 164 et seq.  
**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 51-277.  
**A.L.R.** — Guardian’s power to make lease

for infant ward beyond minority or term of guardianship. 6 A.L.R.3d 570.  
Propriety of surgically invading incompetent or minor for benefit of third party. 4 A.L.R.5th 1000.

COMMENT TO OFFICIAL TEXT

See Section 5-212. See, also, Section 5-424(a) which confers the powers of a guardian on a conservator who is responsible for the

estate of a minor under 18 for whom no guardian has been named.

**15-5-210. Termination of appointment of guardian — General. —**  
A guardian’s authority and responsibility terminates upon the death,

resignation or removal of the guardian or upon the minor's death, adoption, marriage or attainment of majority, but termination does not affect his liability for prior acts, nor his obligation to account for funds and assets of his ward. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. [I.C., § 15-5-210, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Termination of guardianship for incapacitated person, § 15-5-306.

### JUDICIAL DECISIONS

#### ANALYSIS

Commencement of running of statute of limitations.  
Duty to account.

#### Commencement of Running of Statute of Limitations.

The guardian-ward relationship is subject to the same rule with regard to the statute of limitations as is the trustee-beneficiary relationship, and the statute does not begin to run against the ward so long as the fiduciary relationship is acknowledged, or until the guardian accounts and is discharged, or in some way repudiates the trust. *Harbaugh v. Myron Harbaugh Motor, Inc.*, 100 Idaho 295, 597 P.2d 18 (1979).

#### Duty to Account.

Although a guardian may no longer be responsible for his ward after the ward reaches the age of majority, the guardian's statutory duty to account for the ward's property continues. *Harbaugh v. Myron Harbaugh Motor, Inc.*, 100 Idaho 295, 597 P.2d 18 (1979).

**Cited in:** *Revello v. Revello*, 100 Idaho 829, 606 P.2d 933 (1979).

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, §§ 75-84.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 36 et seq.

#### 15-5-211. Proceedings subsequent to appointment — Venue. —

(a) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, if in this state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever is in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed. If the court in which acceptance of appointment is filed is in another state, the court in this state shall proceed in accordance with chapters 9, 10 and/or 11, title 15, Idaho Code, as



appropriate. [I.C., § 15-5-211, as added by 1971, ch. 111, § 1, p. 233; am. 2006, ch. 182, § 1, p. 565.]

### STATUTORY NOTES

**Cross References.** — Venue in proceedings subsequent to appointment of guardian for incapacitated person, § 15-5-313.

**Amendments.** — The 2006 amendment,

by ch. 182, substituted “if in this state” for “in this or another state” in the first sentence and added the last sentence in subsection (b).

### JUDICIAL DECISIONS

#### Habeas Corpus Proceeding.

Where the two minor children resided in Bonneville County at the time a habeas corpus proceeding was commenced in November, 1977, the magistrate division of the district court in Bonneville County was the only court with jurisdiction over any matters relating to the guardianship, and the district court should have denied the mother’s petition for

writ of habeas corpus on the basis that the magistrate’s order appointing the grandparents coguardians of the two minors gave the custody of the persons of said minors, and that the order could not be collaterally attacked in the habeas corpus proceeding. *Revello v. Revello*, 100 Idaho 829, 606 P.2d 933 (1979).

### RESEARCH REFERENCES

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 136 et seq., 228 et seq., 258, 259.

### COMMENT TO OFFICIAL TEXT

Under Section 1-302 [not adopted in Idaho], the Court is designated as the proper court to handle matters relating to guardianship. The present section is intended to give jurisdiction to the forum where the ward resides as well as to the one where appointment initiated. This has primary importance where the

ward’s residence has been moved from the appointing state. Because the Court where acceptance of appointment is filed may as a practical matter be the only forum where jurisdiction over the person of the guardian may be obtained (by reason of Section 5-208), that Court is given concurrent jurisdiction.

**15-5-212. Resignation or removal proceedings.** — (a) Any person interested in the welfare of a ward, or the ward, if fourteen (14) or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

(b) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

(c) If, at any time in the proceeding, the court determines that the interests of the ward are, or may be, inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is fourteen (14) or more years of age. [I.C., § 15-5-212, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Resignation or removal of guardian of incapacitated person, § 15-5-307.

## RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, §§ 74-85.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 41-50.

**15-5-212A. Guardianships arising in connection with a proceeding under the child protective act.** — Where a minor is within the jurisdiction of a court under the child protective act, or where a guardianship proceeding arose in connection with a permanency plan for a minor who was the subject of a proceeding under the child protective act:

(1) The court having jurisdiction over the proceeding under the child protective act shall have exclusive jurisdiction and venue over any guardianship proceeding involving such minor unless, in furtherance of the permanency plan, the court declines to exercise such jurisdiction and venue, notwithstanding sections 15-5-205 and 15-5-211, Idaho Code.

(2) In any action connected to a guardianship governed by this section, in addition to notice or service upon interested parties pursuant to section 15-1-401, Idaho Code, notice of the following shall be served upon the department of health and welfare in the manner prescribed in Idaho rule of civil procedure 4(d)(5):

- (a) Any petition for the appointment of a guardian of a minor;
- (b) Any pleading filed in connection with such guardianship;
- (c) Any proceeding of any nature in such guardianship; or
- (d) The time and place of any hearing in connection with such guardianship.

(3) In any action governed by this section, the department of health and welfare shall have the right to appear and be heard at any hearing, and shall have the right to intervene at any stage of the action.

(4) A guardian appointed in an action governed by this section may not consent to the adoption of the minor without providing prior notice of the action of adoption to the department of health and welfare in a manner prescribed in section 15-1-401, Idaho Code.

(5) Any person who moves to terminate a guardianship governed by this section has the burden of proving, by clear and convincing evidence, that:

- (a) There has been a substantial and material change in the circumstances of the parent or the minor since the establishment of the guardianship; and
- (b) Termination of the guardianship would be in the best interests of the minor.

(6) In any action governed by this section, any person who moves to remove a guardian or modify a guardianship has the burden of proving, by clear and convincing evidence, that:

- (a) There has been a substantial and material change in the circumstances of the parent or the minor since the establishment of the guardianship; and
- (b) Removal of the guardian or modification of the guardianship would be in the best interests of the minor. [I.C., § 15-5-212A, as added by 2007, ch. 72, § 1, p. 195.]

#### STATUTORY NOTES

**Cross References.** — Child protective act, § 16-1601 et seq. Department of health and welfare, § 56-1001 et seq.

**15-5-213. De facto custodian.** — (1) “De facto custodian” means a person who has been the primary caregiver for, and primary financial supporter of, a child who, prior to the filing of a petition for guardianship, has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older.

(2) If a court determines by clear and convincing evidence that a person meets the definition of a de facto custodian, and that recognition of the de facto custodian is in the best interests of the child, the court shall give the person the same standing that is given to each parent in proceedings for appointment of a guardian of a minor. In determining whether recognition of a de facto custodian is in the child’s best interests, the court shall consider:

- (a) Whether the child is currently residing with the person seeking recognition as a de facto custodian; and
- (b) If the child is not currently residing with the person seeking de facto custodian status, the length of time since the person served as the child’s primary caregiver and primary financial supporter. [I.C., § 15-5-213, as added by 2004, ch. 145, § 2, p. 475; am. 2005, ch. 113, § 2, p. 364.]

#### PART 3. GUARDIANS OF INCAPACITATED PERSONS

**15-5-301. Testamentary appointment of guardian for incapacitated person or developmentally disabled person.** — (a) The parent of an incapacitated person or developmentally disabled person may by will appoint a guardian of the incapacitated person or developmentally disabled person. A testamentary appointment by a parent becomes effective when, after having given seven (7) days’ prior written notice of his intention to do so to the incapacitated person or developmentally disabled person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated, if prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(b) The spouse of a married incapacitated person or developmentally disabled person may by will appoint a guardian of the incapacitated person



or developmentally disabled person. The appointment becomes effective when, after having given seven (7) days' prior written notice of his intention to do so to the incapacitated person or developmentally disabled person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

(c) This state shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.

(d) On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under the succeeding sections of this part.

(e) If the appointment by will is for a developmentally disabled person and there is an existing guardianship proceeding under chapter 4, title 66, Idaho Code, in which the decedent was the sole guardian, the guardian appointed by will must also give seven (7) days' written notice of his intention to file an acceptance of appointment to any then serving guardian ad litem for the developmentally disabled person in such proceeding and to the department of health and welfare for the region in which the proceeding was brought.

(f) If the appointment by will is for an incapacitated person for whom there is an existing guardianship proceeding in which the decedent was the sole guardian, the guardian appointed by will must also give seven (7) days' written notice of his intention to file an acceptance of appointment to any then serving guardian ad litem for the incapacitated person in such proceeding. [I.C., § 15-5-301, as added by 1971, ch. 111, § 1, p. 233; am. 2009, ch. 86, § 1, p. 236.]

#### STATUTORY NOTES

**Cross References.** — Disabled person, proceedings for appointment of guardians and conservators, §§ 66-404, 66-405.

"Incapacitated person" defined, § 15-5-101.

Testamentary appointment of guardian of a minor, § 15-5-202.

**Amendments.** — The 2009 amendment, by ch. 86, in the section catchline and throughout subsections (a) and (b), inserted "or developmentally disabled person" and added subsections (e) and (f).

#### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 21 et seq.

## COMMENT TO OFFICIAL TEXT

This section, modeled after Section 5-202, is designed to give the surviving parent, or the spouse, of an incapacitated person, the ability to confer the authority of a guardian on a person designated by will. This opportunity may be most useful in cases where parents, during their lifetime, have arranged an informal or voluntary commitment of an incompetent child, and are anxious to designate another who can maintain contact with the patient and act on his behalf without the necessity of a sanity hearing. The person

designated by will must act by filing acceptance of the appointment. This provides a check against will directions which might prove to be unwise or unnecessary after the parents' death. Moreover, the testamentary designee will have the risk of the possibility that the ward is not in fact incapacitated to prevent him from using the authority conferred to restrain the liberty of the ward. In cases of doubt, the testamentary appointee should petition for a Court appointment under Section 5-303.

**15-5-302. Venue.** — The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits. [I.C., § 15-5-302, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Cross References.** — Venue in guardianship proceedings for a minor, § 15-5-205.

## COMMENT TO OFFICIAL TEXT

Venue in guardianship proceedings lies in the county where the incapacitated person is present, as well as where he resides. Thus, if the person is temporarily away from his county of usual abode, the Court of the county where he happens to be may handle requests

for guardianship proceedings relating to him. In protective proceedings, venue is normally in the county of residence. See Section 5-403. See Section 1-303 for disposition when venue is in two counties and for transfer of venue.

**15-5-303. Procedure for court appointment of a guardian of an incapacitated person.** — (a) The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian, limited or general. It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their own needs. Recognizing that every individual has unique needs and differing abilities, the public welfare should be promoted by establishing a guardianship that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of guardianship that least interferes with legal capacity of a person to act in his own behalf. The petition shall include a plan in reasonable detail for the proposed actions of the guardian regarding the affairs of the ward after appointment of the guardian, to the extent reasonably known to the petitioner at the time of filing of the petition.



If the complete mental, physical and emotional status, and the health care needs and other needs of the ward are not reasonably known to the petitioner at the time the petition is filed, or if the petitioner is not the proposed guardian, then the guardian shall submit to the court, and to all interested persons, in writing, within thirty (30) days after appointment of the guardian, a reasonably detailed plan covering such matters. Such plan must also be given to any person who has filed a request for notice under section 15-5-406, Idaho Code, and to other persons as the court may direct. Such plan shall be given to all such persons in accordance with the methods set forth in section 15-1-401, Idaho Code. If the plan changes during any time period between the periodic reports of the guardian, the modified plan shall be filed with the next report as a part thereof.

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician or other qualified person appointed by the court who shall submit his report in writing to the court. The court may, in appropriate cases, appoint a mental health professional, defined as a psychiatrist, psychologist, gerontologist, licensed social worker, or licensed counselor, to examine the proposed ward and submit a written report to the court. The person alleged to be incapacitated also shall be interviewed by a visitor sent by the court. The visitor shall also interview the person who appears to have caused the petition to be filed and any person who is nominated to serve as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the court. Where possible without undue delay and expenses beyond the ability to pay of the allegedly incapacitated person, the court, in formulating the judgment, may utilize the service of any public or charitable agency that offers or is willing to evaluate the condition of the allegedly incapacitated person and make recommendations to the court regarding the most appropriate form of state intervention in his affairs.

(c) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be represented by counsel, to present evidence and subpoena witnesses and documents, to examine witnesses, including the court-appointed physician, mental health professional, or other person qualified to evaluate the alleged impairment, as well as the court-appointed visitor, and otherwise participate in the hearing. The hearing may be a closed hearing upon the request of the person alleged to be incapacitated or his counsel and a showing of good cause. After appointment, the guardian shall immediately provide written notice of any proposed change in the permanent address of the ward to the court and all interested parties. [I.C., § 15-5-303, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. 1982, ch. 285, § 3, p. 719; am. 1999, ch. 128, § 1, p. 369; am. 2005, ch. 51, § 1, p. 187.]



### STATUTORY NOTES

**Cross References.** — Guardians ad litem as parties to action, § 5-306.

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 31 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 28-35.

**A.L.R.** — Mental condition which will justify the appointment of guardian, committee, or conservator of the estate for an incompetent or spendthrift. 9 A.L.R.3d 774.

### COMMENT TO OFFICIAL TEXT

The procedure here is similar to, but not precisely the same as, protective proceedings for certain disabled persons. It is not required that the visitor be a lawyer. In urban areas,

the visitor may be a social worker capable of determining the needs of the person for whom the appointment is sought.

**15-5-304. Findings — Order of appointment.** — (a) The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure.

(b) The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. The court, on appropriate findings, may

(1) Treat the petition as one for a protective order under section 15-5-401, Idaho Code, and proceed accordingly;

(2) Enter any other appropriate order; or

(3) Dismiss the proceedings.

(c) The court may, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, limit the powers of a guardian otherwise conferred by this section and thereby create a limited guardianship. Any limitations on the statutory power of a guardian of an incapacitated person shall be endorsed on the guardian's letters, or in the case of a guardian by testamentary appointment, shall be reflected in letters that shall be issued at the time any limitation is imposed. Following the same procedure, a limitation may be removed and appropriate letters issued. [I.C., § 15-5-304, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 4, p. 719.]

### COMMENT TO OFFICIAL TEXT

The purpose of guardianship is to provide for the care of a person who is unable to care for himself. There is no reason to seek a guardian in those situations where the problems to be dealt with center around the property of a disabled person. In that event, a

protective proceeding under Part 4 may be in order.

It is assumed that the standards suggested by the definition in Section 5-101 for the "incapacitated" person are different from those which will determine when a person

may be committed as mentally ill: For example, involuntary commitment proceedings may well be inappropriate unless it is determined that the patient is or probably will become dangerous to himself or the person or property of others. As indicated in 5-101, the meaning of "incapacitated" turns on whether the subject lacks "understanding or capacity to make or communicate responsible decisions concerning his person." There is overlap between the two sets of standards, but they are different. Hence, a finding that a person is "incapacitated" does not amount to a finding that he is mentally ill, or can be committed. In the reverse situation, if a person has been committed to institutional care and custody because of mental illness, it may be unnecessary to appoint a guardian for him. Nonethe-

less, it may be desirable to have a personal guardian for one who is or may be committed or who will be cared for by an institution. For one thing, a guardian, having custody, might arrange for a voluntary care arrangement like that which a parent for a minor and incapacitated child could establish. Moreover, the limited authority of a guardian over property of his ward may be appropriate in cases where the ward is committed. Because the relationship between existing guardianship legislation and the handling of committed persons appears to vary considerably from state to state, the Code was deliberately left rather general on points relevant to the relationship. Section 5-312 qualifies the power of a guardian to determine the place of residence of a ward who has been committed.

### **15-5-305. Acceptance of appointment — Consent to jurisdiction.**

— By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner. [I.C., § 15-5-305, as added by 1971, ch. 111, § 1, p. 233.]

### **STATUTORY NOTES**

**Cross References.** — Consent to service by acceptance of appointment as guardian of minor, § 15-5-208.

### **RESEARCH REFERENCES**

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 28 et seq.

### **COMMENT TO OFFICIAL TEXT**

The proceedings under Article V [Chapter 5] are flexible. The Court should not appoint a guardian unless one is necessary or desirable for the care of the person. If it develops that the needs of the person who is alleged to be incapacitated are not those which would call

for a guardian, the Court may adjust the proceeding accordingly. By acceptance of the appointment, the guardian submits to the Court's jurisdiction in much the same way as a personal representative. Cf. Sec. 3-602.

### **15-5-306. Termination of guardianship for incapacitated person.**

— (1) Subject to subsection (2) of this section, the authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in section 15-5-307[, Idaho Code,] of this part. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward.

(2) If the conditions set forth in section 54-1142(1)(j)[, Idaho Code,] exist, then the guardianship shall continue as set forth in that section. [I.C., § 15-5-306, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 19, p. 510; am. 2006, ch. 181, § 2, p. 560.]

#### STATUTORY NOTES

**Cross References.** — Termination of appointment as guardian of minor, § 15-5-210.

**Amendments.** — The 2006 amendment, by ch. 181, added the subsection (1) designation; added “Subject to subsection (2) of this

section” to the beginning of subsection (1); and added subsection (2).

**Compiler’s Notes.** — The bracketed insertions in subsections (1) and (2) were added by the compiler.

#### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 74 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 36-50.

**15-5-307. Removal or resignation of guardian — Termination of incapacity.** — (a) On petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(b) An order adjudicating incapacity may specify a minimum period, not exceeding one (1) year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward or any person interested in his welfare may petition for an order that he is no longer incapacitated, and for removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(c) Before removing a guardian, accepting the resignation of a guardian, or ordering that a ward’s incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian, and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

(d) Upon request, a jury may be summoned to hear factual issues as in other civil cases. [I.C., § 15-5-307, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Cross References.** — Resignation or removal proceedings for guardian of minor, § 15-5-212.



**JUDICIAL DECISIONS****DECISIONS UNDER PRIOR LAW****Adjudication of Restoration to Sanity.**

The court has jurisdiction to adjudicate a

restoration to sanity or competency. *Whitney v. Randall*, 58 Idaho 49, 70 P.2d 384 (1937).

**RESEARCH REFERENCES**

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, §§ 77, 78.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 41-50.

**COMMENT TO OFFICIAL TEXT**

The ward's incapacity is a question that may usually be reviewed at any time. However, provision is made for a discretionary

restriction on review. In all review proceedings, the welfare of the ward is paramount.

**15-5-308. Visitor in guardianship proceeding.** — (1) A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, psychology, social work, or counseling or has other qualifications that make him suitable to perform the function and is an officer, employee or special appointee of the court with no personal interest in the proceedings. The visitor's report is to include the following information: a description of the nature, cause and degree of incapacity, and the basis upon which this judgment is made; a description of the needs of the person alleged to be incapacitated for care and treatment and the probable residential requirements; a statement as to whether a convicted felon resides in or frequents the incapacitated person's proposed residence; an evaluation of the appropriateness of the guardian or conservator whose appointment is sought and a description of the steps the proposed guardian or conservator has taken or intends to take to meet the needs of the incapacitated person; a description of the abilities of the alleged incapacitated person and a recommendation as to whether a full or limited guardianship or conservatorship should be ordered and, if limited, the visitor's recommendation of the specific areas of authority the limited guardianship or conservator should have and the limitations to be placed on the incapacitated person; any expression of approval or disapproval made by the alleged incapacitated person concerning the proposed guardianship or conservatorship; an analysis of the financial status and assets of the alleged incapacitated person; identification of people with significant interest in the welfare of the alleged incapacitated person who should be informed of the proceedings; a description of the qualifications and relationship of the proposed guardian or conservator; an explanation of how the alleged incapacitated person responded to the advice of the proceedings and the right to be present at the hearing on the petition; in the case of conservatorship, a recommendation for or against a bond requirement for the proposed conservator, taking into account the financial statement of the person whose appointment is sought.

(2) Any person appointed as a visitor shall be personally immune from any liability for acts, omissions or errors in the same manner as if such

person were a volunteer or director under the provisions of section 6-1605, Idaho Code.

(3) The visitor may not also be appointed as guardian ad litem for the person alleged to be incapacitated nor may the guardian ad litem for the person alleged to be incapacitated be appointed as visitor, nor may the visitor and the guardian ad litem for the person alleged to be incapacitated be members or employees of the same entity including, but not limited to, being members or employees of the same law firm.

(4) The visitor shall have the discretionary authority to conduct a criminal background check on a proposed guardian, conservator or a person who resides in or frequents the incapacitated person's proposed residence. [I.C., § 15-5-308, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 20, p. 510; am. 1997, ch. 201, § 1, p. 576; am. 1999, ch. 128, § 2, p. 369; am. 2002, ch. 217, § 1, p. 595; am. 2008, ch. 74, § 1, p. 195.]

### STATUTORY NOTES

**Amendments.** — The 2008 amendment, by ch. 74, in subsection (1), inserted “a statement as to whether a convicted felon resides in or frequents the incapacitated person's proposed residence”; and added subsection (4).

### RESEARCH REFERENCES

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 28 et seq.

### COMMENT TO OFFICIAL TEXT

The visitor should have professional training and should not have a personal interest in the outcome of the guardianship proceedings.

**15-5-309. Notices in guardianship proceedings.** — (1) In a proceeding for the appointment or removal of a guardian of an incapacitated person and, if notice is required in a proceeding for appointment of a temporary guardian, notice of hearing shall be given to each of the following:

- (a) The ward or the person alleged to be incapacitated and his spouse, or, if none, his adult children or if none, his parents;
- (b) Any person who is serving as his guardian, conservator or who has his care and custody;
- (c) In case no other person is notified under subsection (1)(a) of this section, at least one (1) of his closest adult relatives, if any can be found; and
- (d) Any person who has filed a request for notice under this section.

(2) Notice shall be served personally on the alleged incapacitated person. In all other cases, required notices shall be given as provided in section 15-1-401, Idaho Code. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed by the visitor or the guardian ad litem. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

(3) Any person desiring notice of any order or filing in a proceeding involving an alleged incapacitated person in whom he is interested may file a request for notice with the court stating his name, the name of the incapacitated person, the nature of the requesting person's interest, and address or that of his attorney. Upon payment of any fee required by statute or court rule, the clerk shall mail a copy of the request to the guardian if one has been appointed or to the petitioner if there is no guardian. A request is effective only as to matters occurring after its filing. [I.C., § 15-5-309, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 5, p. 719; am. 2007, ch. 70, § 1, p. 187; am. 2007, ch. 71, § 2, p. 189.]

### STATUTORY NOTES

**Amendments.** — This section was amended by two 2007 acts which appear to be compatible and have been compiled together.

The 2007 amendment, by ch. 70, changed the designations in the section to match the scheme used generally in the Idaho Code; and, in subsection (2), deleted the former second sentence, which read: "Notices to other persons as required by this section shall be served personally if the person to be notified can be found within the state," and in the third sentence, substituted "confirmed by the visitor or guardian ad litem" for "confirmed in an interview with the visitor."

The 2007 amendment, by ch. 71, changed the designations in the section to match the scheme generally used in the Idaho Code; and, in subsection (3), deleted the former last sentence, which read: "Any governmental agency paying or planning to pay benefits to the alleged incapacitated person, or any public or charitable agency that regularly concerns itself with methods for preventing unnecessary and overly intrusive court intervention in the affairs of persons for who guardians may be sought and that seeks to participate in the proceedings, as an interested person in a guardianship proceeding."

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 52 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 30, 31.

### COMMENT TO OFFICIAL TEXT

The persons entitled to notice in guardianship proceeding are usually fewer in number than those in a protective proceeding. Cf. Sec.

5-405. Required notice shall be given in accordance with the general notice provision of the Code. See Section 1-401.

**15-5-310. Temporary guardians.** — (a) If the court finds that a guardian is not properly performing the duties of guardian or an emergency exists such that the likely result will be substantial harm to an alleged incapacitated person's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the alleged incapacitated person's welfare, may appoint an emergency guardian whose authority may not exceed ninety (90) days, unless extended for good cause upon application of the temporary guardian. The emergency guardianship must be limited to only those powers absolutely necessary, or the least restrictive to the proposed ward, for the immediate health and safety of the proposed ward until such time as a full hearing may be held in the matter and the emergency guardian may exercise only those powers specified in the order. Emergency letters of guardianship shall allow the temporary guardian only such access to the proposed ward's assets as is necessary to provide and pay



for the proposed ward's necessities of life, including short and long-term health care, but shall expressly deny a temporary guardian the right to have the temporary guardian's name added to any assets of the proposed ward pending a hearing on the guardianship.

(b) The court shall appoint a guardian ad litem to represent the proposed ward in all cases involving a petition for adjudication of incapacity. The alleged incapacitated person may substitute his own attorney for the guardian ad litem appointed by the court. Any attorney representing an alleged incapacitated person may not serve as guardian of the proposed ward or as counsel for the petitioner for guardianship.

(c) An emergency guardian may be appointed without notice to the alleged incapacitated person or his attorney only if the court finds from affidavit or other sworn testimony that the proposed ward will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the proposed ward, the proposed ward must be given notice of the appointment within forty-eight (48) hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within five (5) days after the appointment if requested by an interested party at which time the court shall appoint a visitor to meet with the alleged incapacitated person and make a written report to the court. The court shall also appoint a physician to examine the proposed ward giving preference to the appointment of the proposed ward's treating physician if the proposed ward has a current treating physician. [I.C., § 15-5-310, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 6, p. 719; am. 1999, ch. 128, § 3, p. 369; am. 2005, ch. 52, § 1, p. 189.]

### STATUTORY NOTES

**Compiler's Notes.** —\* The words "this code" refer to the Uniform Probate Code as adopted by S.L. 1971, ch. 111, § 1, compiled in chapters 1 through 7 of this title.

### COMMENT TO OFFICIAL TEXT

The temporary guardian is analogous to a special administrator under Sections 3-614 through 3-618. His appointment would be obtained in emergency situations or as a protective device against default by a guardian. The temporary guardian has all the powers of a guardian, except as the order appointing him may provide otherwise.

**15-5-311. Who may be guardian — Priorities.** — (1) Any competent person, except as set forth hereafter, or a suitable institution may be appointed guardian of an incapacitated person.

(2) The person preferred by the incapacitated person shall be appointed guardian unless good cause be shown why appointment of such person is contrary to the best interests of the incapacitated person. If the incapacitated person is unable to express a preference, any previous expression, including a durable power of attorney for health care, may be considered by the court.

(3) Persons who are not disqualified have priority for appointment as guardian in the following order:

- (a) The person preferred by the incapacitated person. The court shall always consider the wishes expressed by an incapacitated person as to who shall be appointed guardian;
- (b) The person(s) nominated as health care agent in a durable power of attorney for health care by the incapacitated person, in the order of priority set forth in such power;
- (c) The spouse of the incapacitated person;
- (d) An adult child of the incapacitated person;
- (e) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- (f) Any relative of the incapacitated person with whom he has resided for more than six (6) months prior to the filing of the petition;
- (g) A person nominated by the person who is caring for him or paying benefits to him.

(4) No convicted felon, or person whose residence is the incapacitated person's proposed residence or will be frequented by the incapacitated person and is frequented by a convicted felon, shall be appointed as a guardian of an incapacitated person unless the court finds by clear and convincing evidence that such appointment is in the best interests of the incapacitated person. [I.C., § 15-5-311, as added by 1971, ch. 111, § 1, p. 233; am. 1999, ch. 128, § 4, p. 369; am. 2000, ch. 179, § 1, p. 447; am. 2004, ch. 52, § 1, p. 242; am. 2008, ch. 74, § 2, p. 196.]

#### STATUTORY NOTES

**Cross References.** — Priorities for appointment as conservator, § 15-5-410.

**Amendments.** — The 2008 amendment, by ch. 74, redesignated subsections; added paragraph (3)(b); and in subsection (4), in-

serted "or person whose residence is the incapacitated person's proposed residence or will be frequented by the incapacitated person and is frequented by a convicted felon."

#### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 40 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 20 et seq.

**A.L.R.** — Priority and preference in appointment of conservator or guardian for an incompetent. 65 A.L.R.3d 991.

**15-5-312. General powers and duties of guardian.** — (1) A guardian of an incapacitated person has the powers and responsibilities of a parent who has not been deprived of custody of his unemancipated minor child except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons for acts of the ward, and except as hereinafter limited. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court when the guardianship is limited:

- (a) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this state. The guardian shall

take reasonable measures to ensure that a convicted felon does not reside with, care for or visit the ward without court approval.

(b) If entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward, and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

(c) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service. A guardian shall be automatically entitled to any information governed by the health insurance portability and accountability act of 1996 (HIPAA), 42 U.S.C. 1320d and 45 CFR 160 through 164, and the appointment of such guardian shall be deemed to grant such release authority.

(d) If no conservator for the estate of the ward has been appointed, the guardian may institute proceedings to appoint a conservator. In no circumstances shall the guardian exercise any of the powers of a conservator.

(e) A guardian shall be required to report as provided in section 15-5-419, Idaho Code.

(f) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code, and the guardian must account to the conservator for funds expended.

(2) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward, and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

(3) A guardian may delegate certain of his responsibilities for decisions affecting the ward's well-being to the ward when reasonable under all of the circumstances. [I.C., § 15-5-312, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 7, p. 719; am. 1989, ch. 241, § 2, p. 587; am. 2004, ch. 53, § 2, p. 243; am. 2008, ch. 74, § 3, p. 196.]

#### STATUTORY NOTES

**Cross References.** — Powers and duties of guardian of minor, § 15-5-209.

**Amendments.** — The 2008 amendment, by ch. 74, redesignated subsections; and added the last sentence in paragraph (1)(a).

**Compiler's Notes.** — The words "this code", which appear in paragraph (1)(f), refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.



## JUDICIAL DECISIONS

**Guardian of Incapacitated Person.**

A guardian of an incapacitated person must make provision for the ward's care, comfort, and maintenance. If no conservator has been appointed, the guardian may receive money and property deliverable to the ward and

apply them to the ward's care, but the guardian must exercise care to conserve any excess for the ward's needs. *East v. West One Bank*, 120 Idaho 226, 815 P.2d 35 (Ct. App. 1991), cert. denied, 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed. 2d 571 (1992).

## RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 86 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 51-277.

**A.L.R.** — Factors considered in making election for incompetent to take under or against will. 3 A.L.R.3d 6.

Time within which election must be made for incompetent to take under or against will. 3 A.L.R.3d 119.

Who may make election for incompetent to take under or against will. 21 A.L.R.3d 320.

Power of court or guardian to make noncharitable gifts or allowances out of funds

of incompetent ward. 24 A.L.R.3d 863.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval by court. 63 A.L.R.3d 780.

Propriety of surgically invading incompetent or minor for benefit of third party. 4 A.L.R.5th 1000.

Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make a compromise or settlement in such suit. 32 A.L.R.5th 673.

## COMMENT TO OFFICIAL TEXT

The guardian is responsible for the care of the person of his ward. This section gives him the powers necessary to carry out this responsibility. Where there are no protective proceedings, the guardian also has limited authority over the property of the ward. Where the ward has substantial property, it may be

desirable to have protective proceedings to handle his property problems. The same person, of course, may serve as guardian and conservator. Section 5-408 authorizes the Court to make preliminary orders protecting the estate once a petition for appointment of a conservator is filed.

**15-5-313. Proceedings subsequent to appointment — Venue. —**

(a) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship, including proceedings to limit the authority previously conferred on a guardian, or to remove limitations previously imposed.

(b) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, if in this state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation, altering his authority or removing a guardian shall be sent to the court in which acceptance of appointment is filed. If the court in which acceptance of appointment is filed is in another state, the court in this state shall proceed in accordance with chapters 9, 10 and/or 11, title 15, Idaho Code, as appropriate. [I.C., § 15-5-313, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 8, p. 719; am. 2006, ch. 182, § 2, p. 565.]

### STATUTORY NOTES

**Cross References.** — Venue in proceedings subsequent to appointment of guardian of minor, § 15-5-211.

**Amendments.** — The 2006 amendment, by ch. 182, in subsection (b), substituted “if in this state” for “in this or another state” in the first sentence and added the last sentence.

**Legislative Intent.** — Section 1 of S.L. 1982, ch. 285 read: “It is hereby declared by

the legislature of the state of Idaho that disabled, aged or otherwise vulnerable adult citizens should be protected from exploitation, abuse and neglect through the availability of guardians and conservators having flexible powers and through the availability of volunteers to act as guardians or conservators where no other person is available to so serve.”

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 152 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 136 et seq., 228 et seq., 258 et seq.

**15-5-314. Compensation and expenses.** — If not otherwise compensated for services rendered or expenses incurred, any visitor, guardian ad litem, physician, guardian, or temporary guardian appointed in a protective proceeding is entitled to reasonable compensation from the estate for services rendered and expenses incurred in such status, including for services rendered and expenses incurred prior to the actual appointment of said guardian or temporary guardian which were reasonably related to the proceedings. If any person brings or defends any guardianship proceeding in good faith, whether successful or not, he or she is entitled to receive from the estate his or her necessary expenses and disbursements including reasonable attorney’s fees incurred in such proceeding. If the estate is inadequate to bear any of the reasonable compensation, fees, and/or costs referenced in this section, the court may apportion the reasonable compensation, fees, and/or costs to any party, or among the parties, as the court deems reasonable. [I.C., § 15-5-314, as added by 2002, ch. 215, § 1, p. 593.]

**15-5-315. Guardian ad litem — Duties.** — Subject to the direction of the court, the guardian ad litem shall have the following duties, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first:

(1) To conduct an independent factual investigation of the circumstances of the ward including, without limitation, the circumstances described in the petition;

(2) To file with the court a written report stating the results of the investigation, the guardian ad litem’s recommendations, and such other information as the court may require. The guardian ad litem’s written report shall be delivered to the court, with copies to all parties to the case, at least five (5) days before the date set for the adjudicatory hearing;

(3) To act as an advocate for the ward for whom appointed at each stage of the proceedings under this chapter and to be charged with the general representation of the ward. To that end, the guardian ad litem shall participate fully in the proceedings to the degree necessary to adequately represent the ward, and shall be entitled to confer with the ward and the

ward's immediate family including, but not limited to, spouse, parents, siblings, children and next of kin;

(4) To facilitate and negotiate to ensure that the court, the department of health and welfare, if applicable, and the ward's attorney, if any, each fulfill their obligations to the ward in a timely fashion;

(5) To monitor the circumstances of a ward, if the ward is found to be within the purview of this chapter, to assure compliance with the law, and to assure that the terms of the court's orders are being fulfilled and remain in the best interest of the ward;

(6) To meet any parent or other person having legal or physical custody of the ward, record the concerns of the parent, and report them to the court or, if no such meeting occurs, file an affidavit stating why no meeting occurred;

(7) To maintain all information regarding the case confidential and to not disclose such information except to the court or to other parties to the case;

(8) To determine whether existing powers, trusts, and other measures may adequately give the ward the legal protection otherwise provided by a guardian, or whether such powers, trusts or other measures could be reasonably created and, if so, to recommend that either no guardianship be granted or that only a suitably limited guardianship be granted; and

(9) To exercise such other and further duties as may be expressly imposed by court order. [I.C., § 15-5-315, as added by 2005, ch. 49, § 1, p. 181.]

**15-5-316. Guardian ad litem — Rights and powers.** — (1) The guardian ad litem has the rights and powers set forth in this section, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first.

(2) The guardian ad litem shall have the right and power to file pleadings, motions, memoranda and briefs on behalf of the ward, and to have all of the rights of the ward, whether conferred by statute, rule of court, or otherwise.

(3) All parties to any proceeding under this chapter shall promptly notify the guardian ad litem, and the guardian's attorney, if any, of all hearings, staff hearings or meetings, investigations, depositions, and significant changes of circumstances of the ward.

(4) Except to the extent prohibited or regulated by federal law, upon presentation of a copy of the order appointing the guardian ad litem, any person or agency including, without limitation, any hospital, school organization, department of health and welfare, doctor, nurse or other health care provider, psychologist, psychiatrist, police department, or mental health clinic, shall permit the guardian ad litem to inspect and copy pertinent records relating to the ward necessary for the proceeding for which the guardian ad litem has been appointed.

(5) The guardian ad litem shall have the discretionary authority to conduct a criminal background check on a proposed guardian, conservator or person who resides in or frequents the ward's proposed residence. [I.C., § 15-5-316, as added by 2005, ch. 49, § 2, p. 181; am. 2008, ch. 74, § 4, p. 197.]



STATUTORY NOTES

**Amendments.** — The 2008 amendment, by ch. 74, added subsection (5).

PART 4. PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

**15-5-401. Protective proceedings.** — Upon petition and after notice and hearing in accordance with the provisions of this Part, the court may appoint a conservator or make other protective order for cause as follows:

(a) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by his minority, or that funds are needed for his support and education and that protection is necessary or desirable to obtain or provide funds.

(b) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that (1) the person is unable to manage his property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and (2) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds. [I.C., § 15-5-401, as added by 1971, ch. 111, § 1, p. 233; am. 1989, ch. 241, § 3, p. 587.]

RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 24 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 7 et seq.

**A.L.R.** — Mental condition which will justify the appointment of guardian, committee,

or conservator of the estate for an incompetent or spendthrift. 9 A.L.R.3d 774.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation. 96 A.L.R.3d 1102.

COMMENT TO OFFICIAL TEXT

This is the basic section of this part providing for protective proceedings for minors and disabled persons. “Protective proceedings” is a generic term used to describe proceedings to establish conservatorships and obtain protective orders. “Disabled persons” is used in this section to include a broad category of persons who, for a variety of different reasons, may be unable to manage their own property.

Since the problems of property management are generally the same for minors and disabled persons, it was thought undesirable to treat these problems in two separate parts. Where there are differences, these have been separately treated in specific sections.

The Comment to Section 5-304, *supra*, points up the different meanings of incapacity (warranting guardianship), and disability.

**15-5-402. Protective proceedings — Jurisdiction of affairs of protected persons.** — After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until

termination of the proceeding, the court in which the petition is filed has:

(a) Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;

(b) Exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state shall be managed, expended or distributed to or for the use of the protected person or any of his dependents;

(c) Concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and his title to any property or claim. [I.C., § 15-5-402, as added by 1971, ch. 111, § 1, p. 233.]

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 31 et seq.

### COMMENT TO OFFICIAL TEXT

While the bulk of all judicial proceedings involving the conservator will be in the court supervising the conservatorship, third parties may bring suit against the conservator or the

protected person on some matters in other courts. Claims against the conservator after his appointment are dealt with by Section 5-428.

**15-5-403. Venue.** — Venue for proceedings under this chapter is:

(a) In the place in this state where the person to be protected resides whether or not a guardian has been appointed in another place; or

(b) If the person to be protected does not reside in this state, in any place where he has property. [I.C., § 15-5-403, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Venue in guardian-ship proceedings, §§ 15-5-205, 15-5-302.

### COMMENT TO OFFICIAL TEXT

Venue for protective proceedings lies in the county of residence (rather than domicile) or, in the case of the nonresident, where his property is located. Unitary management of

the property is obtainable through easy transfer of proceedings (Section 1-303(b)) and easy collection of assets by foreign conservators (Section 5-431).

**15-5-404. Original petition for appointment or protective order.**

— (a) The person to be protected, any person who is interested in his estate, affairs or welfare including his parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition shall set forth to the extent known, the interest of the petitioner; the name, age, residence and address of the person to be protected; the name and address of his guardian, if any; the name and address of his nearest relative known to the petitioner; a general statement

of his property with an estimate of the value thereof, including any compensation, insurance, pension or allowance to which he is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his priority for appointment.

(c) The petition shall include a financial plan for the proposed actions of the conservator regarding the financial affairs of the protected person after appointment of the conservator, to the extent reasonably known to the petitioner at the time of filing of the petition. If the complete assets, income, expenses, debts and other financial concerns of the protected person are not reasonably known to the petitioner at the time the petition is filed, or if the petitioner is not the proposed conservator, then the conservator shall submit to the court, and to all interested persons, in writing, within the ninety (90) day inventory, as a part thereof, a financial plan covering all of the assets, income, expenses, debts and other financial concerns of the protected person. Such financial plan must also be given to any person who has filed a request for notice under section 15-5-406, Idaho Code, and to other persons as the court may direct. Such financial plan shall be given to all such persons in accordance with the methods set forth in section 15-1-401, Idaho Code. If the financial plan changes during any time period between the periodic reports of the conservator, the modified financial plan shall be filed with the next report as a part thereof. The financial plan and any modified financial plan filed pursuant to this subsection (c) shall be subject to examination and review by the court, or persons designated by the court to make such examination and review, as provided by rules adopted by the Idaho supreme court. [I.C., § 15-5-404, as added by 1971, ch. 111, § 1, p. 233; am. 2005, ch. 51, § 2, p. 187; am. 2009, ch. 78, § 2, p. 214.]

STATUTORY NOTES

Cross References. — Ninety day inventory, § 15-5-418.

by ch. 78, added the last sentence in subsection (c).

Amendments. — The 2009 amendment,

RESEARCH REFERENCES

Am. Jur. — 39 Am. Jur. 2d, Guardian and Ward, §§ 60, 61.

C.J.S. — 39 C.J.S., Guardian and Ward, § 28 et seq.

**15-5-405. Notice.** — On a petition for appointment of a conservator or other protective order, notice shall be given in accordance with section 15-5-309, Idaho Code. [I.C., § 15-5-405, as added by 1971, ch. 111, § 1, p. 233; am. 2007, ch. 70, § 2, p. 187; am. 2007, ch. 71, § 3, p. 189; am. 2008, ch. 27, § 4, p. 45.]

STATUTORY NOTES

Amendments. — This section was amended by two 2007 acts which appear to be

compatible and have been compiled together. The 2007 amendment, by ch. 70, rewrote



the section, revising the notice provisions of a petition for appointment of a conservator or other protective order.

The 2007 amendment, by ch. 71, changed the designations in the section to match the scheme used generally in the Idaho Code; and in the first sentence in subsection (1), deleted “and any government agency paying benefits to the person sought to be protected (if the person seeking the appointment has knowl-

edge of the existence of these benefits)” following “guardian or conservator.” However, the changes by S.L. 2007, ch. 71, § 3 could not be given effect because of the revision of the section by S.L. 2007, ch. 70, § 5.

The 2008 amendment, by ch. 27, deleted data from the beginning of the section that was inadvertently left there by the 2007 amendments of the section.

## RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 52 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 30, 31.

**15-5-406. Protective proceedings — Request for notice — Interested person.** — Any person desiring notice of any order or filing in a protective proceeding described in this part involving a person in whom he is interested may file a request for notice with the court stating his name, the name of the alleged disabled person, the nature of the requesting person’s interest, and his address or that of his attorney. Upon payment of any fee required by statute or court rule, the clerk shall mail a copy of the request to the conservator if one has been appointed, or to the petitioner if there is no conservator. A request is effective only as to matters occurring after its filing. [I.C., § 15-5-406, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 9, p. 719; am. 2007, ch. 71, § 4, p. 189.]

## STATUTORY NOTES

**Amendments.** — The 2007 amendment, by ch. 71, deleted the former last sentence, which read: “Any government agency paying or planning to pay benefits to the alleged disabled person, and any public or charitable agency that regularly concerns itself with

methods for preventing unnecessary or overly intrusive court intervention in the affairs of persons for who protective orders may be sought and that seeks to participate in the proceedings, is an interested person in a protective proceeding under this part.”

**15-5-407. Procedure concerning hearing and order on original petition.** — (a) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it must appoint an attorney to represent the minor, giving consideration to the choice of the minor if fourteen (14) years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(b) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing.

Unless the person to be protected has counsel of his own choice, the court may appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs,

or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(c) After hearing, upon finding that a basis of the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate order. [I.C., § 15-5-407, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 14, p. 319.]

#### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 38 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 33-35.

**A.L.R.** — Mental condition which will justify the appointment of guardian, committee, or conservator of the estate of an incompetent or spendthrift. 9 A.L.R.3d 774.

#### COMMENT TO OFFICIAL TEXT

The section establishes a framework within which professionals, including the judge, attorney and physician, if any, may be expected to exercise good judgment in regard to the minor or disabled person who is the subject of

the proceeding. The National Conference accepts that it is desirable to rely on professionals rather than to attempt to draft detailed standards or conditions for appointment.

**15-5-407A. Temporary and emergency appointments.** — (a) The court may appoint upon an ex parte petition, without hearing, a person to act as temporary conservator, pending the final hearing, upon a finding supported by statement made under oath that an emergency situation exists. The emergency appointment shall remain in effect no longer than ninety (90) days, unless extended for good cause upon application of the temporary conservator.

(b) Any one (1) of the following shall be considered an emergency situation:

(1) A finding that the person to be protected is unable to reasonably manage said person's finances and as a result the person's assets will be wasted or dissipated unless proper management is provided without delay; or

(2) A finding that the person to be protected has been taken advantage of and that the situation is likely to continue unless a temporary appointment is made without delay; or

(3) A finding that funds are needed for support, care and welfare of the person to be protected and a temporary appointment is necessary to secure such funding; or

(4) A finding that other conditions exist that in the court's determination necessitate the appointment of a temporary conservator.

(c) The duty of a temporary conservator shall be to preserve and protect the assets of the estate and to provide the funding necessary for the support, care and welfare of the person to be protected. The conservator shall have all the powers enumerated in section 15-5-424, Idaho Code, to be exercised,

however, only within said limited context. The court may expand the duties of the temporary conservator upon application and a finding that a proposed action is necessary prior to the hearing.

(d) A temporary conservator shall not remove any of the assets of the estate from the jurisdiction of the court without a specific order to that effect.

(e) The petition for appointment of a temporary conservator must be accompanied by a petition for appointment of a conservator pursuant to section 15-5-404, Idaho Code.

(f) If the person to be protected is a minor, the court shall appoint a guardian ad litem for said minor at the same time the temporary appointment of a conservator is made.

(g) Upon application by an interested party and a hearing, the court may limit the powers and duties of the temporary conservator.

(h) Notice of the appointment of a temporary conservator shall be given to all interested persons by the petitioner within five (5) days after the date of such appointment.

(i) The court shall hold a hearing on the appropriateness of the temporary appointment within five (5) days if requested by an interested party. In such event, if a visitor and physician have not already been appointed, the court shall appoint a visitor to meet with the alleged incapacitated person and to make a written report to the court, and shall appoint a physician to examine the proposed ward and submit a written report to the court, giving preference to the appointment of the proposed ward's treating physician if the proposed ward has a current treating physician. [I.C., § 15-5-407A, as added by 2004, ch. 53, § 1, p. 243; am. 2005, ch. 52, § 2, p. 189.]

#### JUDICIAL DECISIONS

**Cited in:** *State v. Fancher*, 145 Idaho 832, 186 P.3d 688 (Ct. App. 2008).

**15-5-408. Permissible court orders.** — (a) The court shall exercise the authority conferred in the part so as to encourage the development of maximum self-reliance and independence of the protected person and make protective orders only to the extent necessitated by the protected person's actual mental and adaptive limitations and other conditions warranting the procedure.

(b) The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents.

(2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the



minor which are or might be necessary for the best interests of the minor, his family and members of his household.

(3) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his right to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer.

(4) The court may exercise or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding twenty per cent (20%) of any year's income of the estate or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either is incapable of consenting or has consented to the proposed exercise of power.

(5) An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person. [I.C., § 15-5-408, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 10, p. 719.]

JUDICIAL DECISIONS

**Cited in:** State v. Fancher, 145 Idaho 832, 186 P.3d 688 (Ct. App. 2008).

RESEARCH REFERENCES

**A.L.R.** — Power of court or guardian to make noncharitable gifts or allowances out of funds of incompetent ward. 24 A.L.R.3d 863.  
Right of guardian or committee of incompe-

tent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval by court. 63 A.L.R.3d 780.

COMMENT TO OFFICIAL TEXT

The Court, which is supervising a conservatorship, is given all the powers which the individual would have if he were of full capacity. These powers are given to the Court

that is managing the protected person's property since the exercise of these powers have important consequences with respect to the protected person's property.

**15-5-409. Protective arrangements and single transactions authorized.** — (a) If it is established in a proper proceeding that a basis exists as described in section 15-5-401 of this Part for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(b) When it has been established in a proper proceeding that a basis exists as described in section 15-5-401 of this Part for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other transaction relating to the protected person's financial affairs or involving his estate if the court determines that the transaction is in the best interests of the protected person.

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

(d) If it is established in a proper proceeding that a basis exists as described in section 15-5-401 of this Part for affecting property and affairs of a person, the court may in its discretion, without appointing a conservator, order the establishment or continuation of a special needs trust as provided in chapter 14, title 68, Idaho Code. [I.C., § 15-5-409, as added by 1971, ch. 111, § 1, p. 233; am. 1995, ch. 214, § 2, p. 742.]

#### COMMENT TO OFFICIAL TEXT

It is important that the provision be made for the approval of single transactions or the establishment of protective arrangements as alternatives to full conservatorship. Under present law, a guardianship often must be

established simply to make possible a valid transfer of land or securities. This section eliminates the necessity of the establishment of long-term arrangements in this situation.

**15-5-409a. Compromise of disputed claim of minor — Procedure.** — When a minor shall have a disputed claim for money against a third person, the father or mother or both with whom the minor resides and who has the care and custody of such minor shall have the right to compromise such claim, but before the compromise shall be valid or of any effect the same shall be approved by the court of the county where the minor resides upon a verified petition in writing, regularly filed with said court. If the court approves such compromise he may direct the money paid to the father

or mother of said minor subject to the provisions of section 15-5-103, Idaho Code, or he, or any other court of competent jurisdiction, may direct the money be paid subject to the provisions of an appropriate protective order which he, or any other court of competent jurisdiction, may issue, or he may require that the money be paid to a conservator appointed pursuant to chapter 5, part 4, of this code; or he may approve the compromise under the provisions of chapter 14, title 68, Idaho Code. No filing fee shall be charged for the filing of any petition for leave to compromise as provided herein. [1973, ch. 26, § 2, p. 50; am. 1974, ch. 199, § 1, p. 1516; am. 1989, ch. 214, § 1, p. 523; am. 1995, ch. 214, § 3, p. 742.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words “this code”, which appear in paragraph (1)(f), refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

#### **15-5-410. Who may be appointed conservator — Priorities. —**

(1) The court may appoint an individual, except as set forth hereafter, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(a) An individual or corporation nominated by the protected person if he is fourteen (14) or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(b) The individual or corporation nominated as conservator of the protected person in the financial power of attorney of the protected person, or if no such nomination is made therein, the individual or corporation nominated as agent therein, provided that:

(i) If the nomination is of coconservators, or coagents, as appropriate, the court may consider whether appointment of coconservators is in the best interests of the protected person or whether a sole conservator should be appointed;

(ii) If several individuals or corporations are nominated in order of priority, the court shall consider such nominations in that order of priority; and

(iii) If more than one (1) financial power of attorney made by the protected person exists, the court shall determine which financial power of attorney is appropriate to be the basis for nomination of a conservator;

(c) The spouse of the protected person;

(d) An adult child of the protected person;

(e) A conservator, guardian of property or other like fiduciary, but not a fiduciary serving only as a trustee, appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(f) A parent of the protected person, or a person nominated by the will of a deceased parent;

(g) Any relative of the protected person with whom he has resided for more than six (6) months prior to the filing of the petition;



(h) A person nominated by the person who is caring for him or paying benefits to him.

(2) A person in priorities (c), (d), (e), (f) or (g) of subsection (1) of this section may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

(3) No convicted felon shall be appointed as a conservator of the estate of a protected person unless the court finds by clear and convincing evidence that such appointment is in the best interests of the protected person. [I.C., § 15-5-410, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. 2004, ch. 52, § 2, p. 242; am. 2008, ch. 145, § 1, p. 429.]

### STATUTORY NOTES

**Cross References.** — Priorities for guardian of incapacitated persons, § 15-5-311.

**Amendments.** — The 2008 amendment, by ch. 145, redesignated former alphabetical

subsection designations numerically, and made internal reference updates in subsection (2); and added paragraph (1)(b).

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 38 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 20-27.

**A.L.R.** — Right of putative father to cus-

tody of illegitimate child. 45 A.L.R.3d 216.

Priority and preference in appointment of conservator or guardian for an incompetent. 65 A.L.R.3d 991.

### COMMENT TO OFFICIAL TEXT

A flexible system of priorities for appointment as conservator has been provided. A

parent may name a conservator for his minor children in his will if he deems this desirable.

**15-5-411. Bond.** — The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in his control plus one (1) year's estimated income minus the value of securities deposited under arrangements requiring an order by the court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization. The court in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land. [I.C., § 15-5-411, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Actions against sureties.  
Coverage of bond.

**Actions Against Sureties.**

Where a guardian has died without settlement of accounts in the ward's estate, the surety may be sued directly for an accounting and judgment. *Madison v. Buhl*, 51 Idaho 564, 8 P.2d 271 (1932).

cures all moneys received from any source which would include a sale of any of the real and personal property of the ward. *Hill v. Federal Land Bank*, 59 Idaho 136, 80 P.2d 789 (1938).

**Coverage of Bond.**

A guardian's general bond covers and se-

**RESEARCH REFERENCES**

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 67.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 10.

**COMMENT TO OFFICIAL TEXT**

The bond requirements for conservators are somewhat more strict than the requirements for personal representatives. Cf. Section 3-603.

**15-5-412. Terms and requirements of bonds.** — (a) The following requirements and provisions apply to any bond required under section 15-5-411 of this Part:

- (1) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other;
- (2) By executing an approved bond of a conservator, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner;
- (3) On petition of a successor conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator;
- (4) The bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation. [I.C., § 15-5-412, as added by 1971, ch. 111, § 1, p. 233.]

**JUDICIAL DECISIONS**

**DECISIONS UNDER PRIOR LAW**

**ANALYSIS**

Actions on bond.  
Excuse of surety.  
Notice to surety.  
Res judicata.

**Actions on Bond.**

The surety of a guardian who has died before settlement of accounts in ward's estate may be sued directly for accounting and judgment. *Madison v. Buhl*, 51 Idaho 564, 8 P.2d 271 (1932).

The settlement of an account with a ward or with the court is essential to maintenance of an action on a guardian's bond. *Short v. Thompson*, 56 Idaho 361, 55 P.2d 163 (1936).

A former ward was entitled to maintain an action for an accounting against the heirs, devisees and donees of the deceased surety of the deceased guardian and to have any property acquired by defendants from said surety without consideration surcharged with the guardian's debt. *Madison v. Buhl*, 51 Idaho 564, 8 P.2d 271 (1932).

**Excuse of Surety.**

A failure on the part of the guardian to account for the proceeds of the sale of real estate will not excuse or absolve his sureties on his original or general guardian's bond. *Hill v. Federal Land Bank*, 59 Idaho 136, 80 P.2d 789 (1938).

**Notice to Surety.**

The surety on a guardian's bond contracts to be bound by all orders of the court within

its jurisdiction decreeing any liability of the guardian, and appearance of guardian is the appearance of the surety for all purposes of fixing liability, and surety is chargeable with notice of all proceedings had touching the liability of his principal. *Short v. Thompson*, 56 Idaho 361, 55 P.2d 163 (1936).

**Res Judicata.**

Where a ward sued his guardian's surety for the amount the court had adjudged the guardian owed the ward, the fact that the complaint contained allegations on which the judgment in court was based did not change the cause of action or waive the right to rely on estoppel by judgment. *Short v. Thompson*, 56 Idaho 361, 55 P.2d 163 (1936).

Judgment holding a guardian liable for unauthorized removal of his ward's funds, being appealable, and order having become final without appeal, the order was res judicata as to the amount due the ward as regards liability of the guardian's surety. *Short v. Thompson*, 56 Idaho 361, 55 P.2d 163 (1936).

**RESEARCH REFERENCES**

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, §§ 67, 188 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 10, 281 et seq.

**COMMENT TO OFFICIAL TEXT**

Once a conservator has been appointed, the Court supervising the trust acts only upon the request of some moving party.

**15-5-413. Acceptance of appointment — Consent to jurisdiction.**

— By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the conservator, or mailed to him by registered or certified mail at his address as listed in the petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner. [I.C., § 15-5-413, as added by 1971, ch. 111, § 1, p. 233.]

**STATUTORY NOTES**

**Cross References.** — Acceptance of appointment as guardian as consent to jurisdiction, §§ 15-5-208, 15-5-305.



JUDICIAL DECISIONS

Personal Jurisdiction of Magistrate.

By accepting the appointment as conservator of her father's estate, daughter submitted personally to the jurisdiction of the court in any proceeding relating to the estate that might have been instituted by any interested

person. The magistrate also had personal jurisdiction over the daughter by virtue of her acceptance of the appointment as guardian. *East v. West One Bank*, 120 Idaho 226, 815 P.2d 35 (Ct. App. 1991), cert. denied, 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed. 2d 571 (1992).

RESEARCH REFERENCES

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 28 et seq.

**15-5-414. Compensation and expenses.** — If not otherwise compensated for services rendered or expenses incurred, any visitor, guardian ad litem, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate for services rendered and expenses incurred in such status, including for services rendered and expenses incurred prior to the actual appointment of said conservator or special conservator which were reasonably related to the proceedings. If any person brings or defends any conservatorship proceeding in good faith, whether successful or not, he or she is entitled to receive from the estate his or her necessary expenses and disbursements including reasonable attorney's fees incurred in such proceeding. If the estate is inadequate to bear any of the reasonable compensation, fees, and/or costs referenced in this section, the court may apportion the reasonable compensation, fees, and/or costs to any party, or among the parties, as the court deems reasonable. [I.C., § 15-5-414, as added by 1971, ch. 111, § 1, p. 233; am. 2002, ch. 215, § 2, p. 593.]

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

Basis of Compensation.

Compensation of guardian is not to be determined on basis of fees and commissions,

but is to be in such amount as court deems just and reasonable. *Luke v. Kettenbach*, 32 Idaho 191, 181 P. 705 (1919).

RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 179 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 103 et seq., 218-221.

**A.L.R.** — Amount of attorneys' compensation in matters involving guardianship and trusts. 57 A.L.R.3d 550.

**15-5-415. Death, resignation or removal of conservator.** — The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After his death, resignation or removal, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of his predecessor. [I.C., § 15-5-415, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 74 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 37, 41-50.

**15-5-416. Petitions for orders subsequent to appointment. —**

(a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order (1) requiring bond or security or additional bond or security, or reducing bond, (2) requiring an accounting for the administration of the trust, (3) directing distribution, (4) removing the conservator and appointing a temporary or successor conservator, or (5) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning his fiduciary responsibility.

(c) Upon notice and hearing, the court may give appropriate instructions or make any appropriate order. [I.C., § 15-5-416, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

**Cited in:** *Brixey v. Hoffman*, 101 Idaho 215, 611 P.2d 1000 (1979).

**15-5-417. General duty of conservator. —** In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by section 15-7-302 of this code. [I.C., § 15-5-417, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

## JUDICIAL DECISIONS

## ANALYSIS

Liability for loss.  
Standards of trustee.

**Liability for Loss.**

A coconservator was not absolutely liable for another conservator's conversion of insurance proceeds; rather, he was liable for that loss only if he breached his fiduciary duties and that breach had some causal connection with the loss. *Brixey v. Hoffman*, 101 Idaho 215, 611 P.2d 1000 (1979).

**Standards of Trustee.**

Under the Uniform Probate Code the duties

and liabilities of a conservator are much the same as those of a trustee. *Brixey v. Hoffman*, 101 Idaho 215, 611 P.2d 1000 (1979).

A conservator acts as a fiduciary and must observe the standards of care applicable to trustees. *East v. West One Bank*, 120 Idaho 226, 815 P.2d 35 (Ct. App. 1991), cert. denied, 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed. 2d 571 (1992).

RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 129 et seq.      **C.J.S.** — 39 C.J.S., Guardian and Ward, § 70 et seq.

**15-5-418. Inventory and records.** — Within ninety (90) days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed. The conservator shall provide a copy thereof to the protected person if he can be located, has attained the age of fourteen (14) years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The inventory filed pursuant to this section shall be subject to examination and review by the court, or persons designated by the court to make such examination and review, as provided by rules adopted by the Idaho supreme court. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person. [I.C., § 15-5-418, as added by 1971, ch. 111, § 1, p. 233; am. 2009, ch. 78, § 3, p. 214.]

STATUTORY NOTES

**Amendments.** — The 2009 amendment, by ch. 78, added the next-to-last sentence.

JUDICIAL DECISIONS

**Keeping and Exhibiting Records.**

While a conservator may expend funds reasonably necessary for the support, education, care, and benefit of the protected person, the conservator must keep suitable records of the administration of the estate and exhibit those

records at the request of any interested person. *East v. West One Bank*, 120 Idaho 226, 815 P.2d 35 (Ct. App. 1991), cert. denied, 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed. 2d 571 (1992).

RESEARCH REFERENCES

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 79.

**15-5-419. Accounts and reports.** — (a) Every conservator or guardian shall submit a written annual report to the court concerning the status of the ward and of the ward’s estate that has been under the guardian’s or conservator’s control. The guardian or conservator shall also be required to provide copies of the report to all persons listed by the court as having an interest in receiving copies of the report. The court may order more frequent reports by its own ruling or pursuant to a petition of any person interested in the ward’s welfare. Every conservator must account annually, or as otherwise directed by the court, and upon his resignation or removal. On termination of the protected person’s minority or disability, a conservator shall account to the court and shall account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermedi-



ate account of a conservator, adjudicates as to his liabilities concerning the matters considered in connection therewith; and an order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the court may specify.

(b) Except as otherwise provided in subsection (c) of this section, every report submitted by a conservator shall cover a specific time period, which period shall be stated explicitly in the report. The report shall cover all of the estate of the protected person which is under the control of the conservator. Supporting documentation for items in the report shall either accompany such report or, if such supporting documentation is voluminous, or expensive to provide, or contains sensitive or private information, or another good reason exists for not providing such supporting documentation with the report, the report shall state the reason that the supporting documentation is not provided and that the supporting documentation is held by, or is reasonably available to, the conservator and will be produced upon request. The report shall contain, to the extent reasonably available to the conservator, at least the following:

(1) A reasonably detailed listing of the starting inventory of the estate of the protected person at the beginning of the time period for which the report is made. Every such inventory item shall be specifically identified; provided however, that items may be reported in categories, such as miscellaneous personal property, rather than individually, and valued by category, when reasonable. The fair market value of each such item or category shall be stated in such starting inventory and the method of determining such fair market value shall also be stated. In the case of an item or category which is secured by an encumbrance or debt of any nature, the encumbrance or debt shall be listed separately from the item or category and shall be specifically identified, including the items or category secured by the encumbrance or debt, the amount of the encumbrance or debt as of the date of the starting inventory, the holder of such debt or encumbrance, the family relationship of such holder to the protected person if actually known to the conservator, and any other reasonably relevant information;

(2) A reasonably detailed listing, for the covered time period, of the receipts, of any nature, by the estate of the protected person; provided however, that the receipts may be reported in categories, such as interest income, social security payments or rental receipts, if reasonable. Such listing shall reasonably identify each such receipt or category, including the source of such receipt or category and the exact amount or fair market value thereof, and the method of determining such amount or fair market value;

(3) A reasonably detailed listing, for the covered time period, of all payments or expenses, of any nature, by the estate of the protected person; provided however, that the payments or expenses may be reported in categories, such as rental or house payments, medical expenses or

transportation expenses, if reasonable. Each such payment or category shall be set forth in reasonable detail, including the amount thereof, to whom the payment was made, the method or frequency of making such payment if not reasonably indicated by the item or category, the consideration for such payment if not reasonably indicated by the item or category, the family relationship of the receiver of such payment to the protected person if actually known to the conservator, the time period covered by such payment if relevant, and any other information reasonably relevant to such payment;

(4) A reasonably detailed listing of the ending inventory of the estate of the protected person at the end of the time period for which the report is made, in the same manner as described above for the starting inventory;

(5) If the report does not, on its face, balance exactly the starting and ending inventories with the receipts and payments of the estate of the protected person, a reasonably detailed analysis and statement of the reasons for such imbalance, and a reasonably detailed listing of the correcting entries necessary to balance such report, such as unrealized gains or losses on assets of the estate, shall be made as part of the report; and

(6) Any other information, of any nature, which is reasonably relevant to the actions of the conservator during the time period covered by the report, which shall be submitted as part of the report or shall accompany such report.

(c) Any report prepared by a federally or state chartered financial institution using a fiduciary accounting system that produces statements containing asset positions, receipts, and disbursements shall be deemed to satisfy the reporting requirements set forth in subsection (b) of this section. The court may order any such report filed by a federally or state chartered financial institution to be supplemented or may order that any information reasonably relevant to the report be produced.

(d) All accounts and reports required by or ordered pursuant to this section, shall be subject to examination and review by the court, or persons designated by the court to make such examination and review, as provided by rules adopted by the Idaho supreme court.

(e) If a conservator or guardian:

(1) Makes a substantial misstatement on filings of any required annual reports; or

(2) Is guilty of gross impropriety in handling the property of the ward; or

(3) Willfully fails to file the report required by this section, after receiving written notice of the failure to file and after a grace period of two (2) months have elapsed;

then the court may impose a fine in an amount not to exceed five thousand dollars (\$5,000) on the conservator or guardian. The court may appoint a guardian ad litem for the ward on its own motion or on the motion of any interested party to represent the ward in any proceedings hereunder and may also appoint appropriate persons or entities to make investigation of the actions of the conservator or guardian. The court may also order restitution of funds misappropriated from the estate of a ward and may

impose a surcharge upon the conservator or guardian responsible for such misappropriation for all damages, costs and other appropriate sums determined by the court, in addition to any fine imposed including, but not limited to, any fees and costs of the guardian ad litem. The court may take any other actions which are in the best interests of the ward and the protection of the assets of the ward. Any sums awarded hereunder shall be paid by the conservator or guardian and may not be paid by the estate of the ward. The court may enter judgment against a conservator or guardian for any or all of the foregoing, and may impose judgment against any bond of such conservator or guardian. [I.C., § 15-5-419, as added by 1971, ch. 111, § 1, p. 233; am. 1989, ch. 241, § 4, p. 523; am. 1990, ch. 290, § 1, p. 810; am. 1999, ch. 108, § 1, p. 336; am. 2005, ch. 50, § 1, p. 184; am. 2009, ch. 78, § 4, p. 214.]

## STATUTORY NOTES

**Amendments.** — The 2009 amendment, redesignated former subsection (d) as subsection (e).  
by ch. 78, added present subsection (d) and

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Annual accounts.  
Attorney's fees.  
Duty of court.  
Interest.  
Recovery of excess payments.

### Annual Accounts.

The settlement and allowance of the annual or intermediate account of a guardian by the court is only prima facie evidence of its correctness and is not conclusive as against the ward so as to prevent a reexamination by the court on the final accounting of the guardian of his entire management of the estate. *Luke v. Kettenbach*, 32 Idaho 191, 181 P. 705 (1919).

### Attorney's Fees.

A guardian is entitled to credit for an attorney's fee paid by him for services rendered to the estate, but he must show the necessity for such service and that the amount so paid was reasonable; but a guardian is not entitled to recover attorney's fees incurred in resisting an attack upon his final account, which attack was invited by the guardian's own neglect and misconduct. *Luke v. Kettenbach*, 32 Idaho 191, 181 P. 705 (1919).

### Duty of Court.

The court has a duty to examine into the account and determine whether it is correct before approving the report. *Short v. Thompson*, 56 Idaho 361, 55 P.2d 163 (1936).

### Interest.

A guardian should be charged interest on the amount of his ward's funds which the guardian has mingled with his own funds. *Luke v. Kettenbach*, 32 Idaho 191, 181 P. 705 (1919).

### Recovery of Excess Payments.

A decree of court made on the settlement of the final account of a guardian adjudging that a certain sum is due the guardian from the ward cannot be made the basis of a personal action against the guardian's former ward after he has been restored to competency; such sum must be recovered, if at all, out of the former ward's estate. *Talbot v. Collins*, 33 Idaho 169, 191 P. 354 (1920).

## RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 164 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 207 et seq.



COMMENT TO OFFICIAL TEXT

The persons who are to receive notice of intermediate and final accounts will be identified by Court order as provided in Section 5-405(b). Notice is given as described in 1-401. In other respects, procedures applicable to accountings will be as provided in court rule.

**15-5-420. Conservators — Title by appointment.** — (a) The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact, or to the part thereof specified in the order. An order specifying that only a part of the property of the protected person vests in the conservator creates a limited conservatorship.

(b) The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

(c) Until termination of his appointment, a conservator has the same power over the title to property of the protected person's estate that an absolute owner would have, provided however, that such power is held in trust for the benefit of the protected person. This power may be exercised without notice, hearing, or order of the court. [I.C., § 15-5-420, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 11, p. 719; am. 2005, ch. 48, § 1, p. 180.]

RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur.\*2d, Guardian and Ward, § 101.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 78.

COMMENT TO OFFICIAL TEXT

This section permits independent administration of the property of protected persons once the appointment of a conservator had been obtained. Any interested person may require the conservator to account in accordance with Section 5-419. As a trustee, a conservator holds title to the property of the protected person. The appointment of a conservator is a serious matter and the Court must select him with great care. Once ap-

pointed, he is free to carry on his fiduciary responsibilities. If he should default in these in any way, he may be made to account to the Court.

Unlike a situation involving appointment of a guardian, the appointment of a conservator has no bearing on the capacity of the disabled person to contract or engage in other transactions.

**15-5-421. Recording of conservator's letters.** — Letters of conservatorship are evidence of transfer of all assets, or the part thereof specified in the letters, of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate subjected to the conservatorship from the conservator to the protected person, or his successors. Letters of conservatorship and orders terminating conservatorship may be recorded in the office of the county

recorder in any county in which property affected by such letters or orders is located and, from the time of filing the same for record, notice is imparted to all persons of the contents of such letters or orders. [I.C., § 15-5-421, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 12, p. 719.]

#### RESEARCH REFERENCES

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 11.

**15-5-422. Sale, encumbrance or transaction involving conflict of interest — Voidable — Exceptions.** — Any sale or encumbrance to a conservator, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the court after notice to interested persons and others as directed by the court. [I.C., § 15-5-422, as added by 1971, ch. 111, § 1, p. 233.]

#### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 106 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 92-94.

**A.L.R.** — Guardian's position as joint tenant of or successor to property in ward's estate as raising conflict of interest. 69 A.L.R.3d 1198.

**15-5-423. Persons dealing with conservators — Protection.** — A person who in good faith either assists a conservator or deals with him for value in any transaction other than those requiring a court order as provided in section 15-5-408 of this Part, is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in section 15-5-426 of this Part are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries. [I.C., § 15-5-423, as added by 1971, ch. 111, § 1, p. 233.]

**15-5-424. Powers of conservator in administration.** — (a) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of an unmarried minor under the age of eighteen (18) years, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in section 15-5-209 of this code until the minor attains the age of eighteen (18) or marries, but the parental rights so conferred on

a conservator do not preclude appointment of a guardian as provided by part 2 of this chapter.

(b) A conservator has power without court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(c) A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation to:

(1) collect, hold and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest and reinvest estate assets in accordance with subsection (b) of this section;

(6) deposit estate funds in a bank including a bank operated by the conservator;

(7) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by



delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(17) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(18) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets and the conservator has a lien on the estate as against the protected person for advances so made;

(19) pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(20) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration and protection of the estate;

(21) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) pay any sum distributable to a protected person or his dependent without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or if none, to a relative or other person with custody of his person;

(23) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator to advise or assist him in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one (1) or more agents to perform any act of administration, whether or not discretionary;

(24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(25) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

[I.C., § 15-5-424, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 15, p. 319.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

#### JUDICIAL DECISIONS

**Cited in:** Old Nat'l Bank v. Tate, 122 Idaho 401, 834 P.2d 1317 (1992).

## DECISIONS UNDER PRIOR LAW

**Actions.**

Guardians of estates of minor children may maintain actions on behalf of such children

under workmen's compensation law. *Workmen's Comp. Exch. v. Chicago, M., St. P. & Pac. R.R.*, 45 F.2d 885 (D. Idaho 1930).

**RESEARCH REFERENCES**

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, §§ 99 et seq., 129 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 51 et seq.

**A.L.R.** — Factors considered in making election for incompetent to take under or against will. 3 A.L.R.3d 6.

Time within which election must be made for incompetent to take under or against will. 3 A.L.R.3d 119.

Guardian's power to make lease for infant ward beyond minority or term of guardianship. 6 A.L.R.3d 570.

Who may make election for incompetent to take under or against will. 21 A.L.R.3d 320.

Power of court or guardian to make noncharitable gifts or allowances out of funds

of incompetent ward. 24 A.L.R.3d 863.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval by court. 63 A.L.R.3d 780.

Ademption or revocation of specific devise or bequest by guardian, committee, or conservator, or trustee of mentally or physically incompetent testator. 84 A.L.R.4th 462.

Propriety of surgically invading incompetent or minor for benefit of third party. 4 A.L.R.5th 1000.

Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make a compromise or settlement in such suit. 32 A.L.R.5th 673.

**15-5-425. Distributive duties and powers of conservator.** — (a) A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care or benefit of the protected person and his dependents in accordance with the following principles:

(1) The conservator is to consider recommendations relating to the appropriate standard of support, education and benefit for the protected person made by a parent or guardian, if any. He may not be surcharged for sums paid to persons or organizations actually furnishing support, education or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person, unless he knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

(2) The conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to (A) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him; (B) the accustomed standard of living of the protected person and members of his household; (C) other funds or sources used for the support of the protected person.

(3) The conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves, and who are in need of support.

(4) Funds expended under this subsection may be paid by the conservator to any person, including the protected person to reimburse for expendi-

tures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(5) A conservator, in discharging the responsibilities conferred by court order and this part, shall implement the principles described in section 15-5-408(a) of this code.

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections [subsection], a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year twenty percent (20%) of the income from the estate.

(c) When a minor who has not been adjudged disabled under subsection (b) of section 15-5-401 of this part attains his majority, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(d) When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(e) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If after forty (40) days from the death of the protected person no other person has been appointed personal representative and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under section 15-3-204 of this code and to any person nominated executor in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection, and indorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section shall have the effect of an order of appointment of a personal representative as provided in section 15-3-308[, Idaho Code,] and parts 6 through 10 of chapter 3 [of this title] except that the estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior re-transfer to the conservator as personal representative.

(f) During the period between the death of a protected person and the appointment of a personal representative for the protected person's estate,



or the conferral of the powers of a personal representative upon the conservator as provided in this section, the person acting as conservator at the time of the deceased protected person's death shall have the duties and powers of a temporary conservator as set forth in section 15-5-407A, Idaho Code, and the powers set forth in section 54-1142(1)(j), Idaho Code. [I.C., § 15-5-425, as added by 1971, ch. 111, § 1, p. 233; am. 1982, ch. 285, § 13, p. 719; am. 2006, ch. 181, § 3, p. 560.]

### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 181, added subsection (f).

**Legislative Intent.** — Section 1 of S.L. 1982, ch. 285 read: "It is hereby declared by the legislature of the state of Idaho that disabled, aged or otherwise vulnerable adult citizens should be protected from exploitation, abuse and neglect through the availability of guardians and conservators having flexible powers and through the availability of volunteers to act as guardians or conservators

where no other person is available to so serve."

**Compiler's Notes.** — The bracketed insertion in subsections (b) and (e) were added by the compiler to provide clarity.

The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

The words enclosed in parentheses so appeared in the law as enacted.

### JUDICIAL DECISIONS

#### Keeping Records.

While a conservator may expend funds reasonably necessary for the support, education, care, and benefit of the protected person, the conservator must keep suitable records of the administration of the estate and exhibit those records at the request of any interested per-

son. *East v. West One Bank*, 120 Idaho 226, 815 P.2d 35 (Ct. App. 1991), cert. denied, 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed. 2d 571 (1992).

**Cited in:** *Old Nat'l Bank v. Tate*, 122 Idaho 401, 834 P.2d 1317 (1992).

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 92 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 60 et seq., 103-110.

**A.L.R.** — Power of court or guardian to make noncharitable gifts or allowances out of funds of incompetent ward. 24 A.L.R.3d 863.

Right of guardian or committee of incompe-

tent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval by court. 63 A.L.R.3d 780.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator, or trustee of mentally or physically incompetent testator. 84 A.L.R.4th 462.

### COMMENT TO OFFICIAL TEXT

This section sets out those situations wherein the conservator may distribute property or disburse funds during the continuance of or on termination of the trust. Section 5-416(b) makes it clear that a conservator

may seek instructions from the Court on questions arising under this section. Subsection (e) is derived in part from § 11.80.150 Revised Code of Washington.

**15-5-426. Enlargement or limitation of powers of conservator.** — Subject to the restrictions in subsection (d) [(b)(4)] of section 15-5-408 of this Part, the court may confer on a conservator at the time of appointment or later, in addition to the powers conferred on him by sections 15-5-424 and 15-5-425 of this Part, any power which the court itself could exercise under subsection[s] (b) and (c) [(b)(2) and (3)] of section 15-5-408 of this Part. The

court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by sections 15-5-424 and 15-5-425 of this Part, or previously conferred by the court, and may at any time relieve him of any limitation. If the court limits any power conferred on the conservator by section 15-5-424 or section 15-5-425 of this Part, the limitation shall be indorsed upon his letters of appointment. [I.C., § 15-5-426, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The bracketed "s" in the first sentence was inserted by the compiler.

The bracketed statutory references in the

first sentence were inserted by the compiler to account for the 1982 amendment to § 15-5-408.

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 86.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 5.

### COMMENT TO OFFICIAL TEXT

This section makes it possible to appoint a fiduciary whose powers are limited to part of the estate or who may conduct important transactions, such as sales and mortgages of land, only with special Court authorization. In the latter case, a conservator would be in much the position of a guardian of property under the law currently in force in most states, except that he would have title to the property. The purpose of giving conservators title as trustees is to ensure that the provi-

sions for protection of third parties have full effect. The Veterans Administration may insist that, when it is paying benefits to a minor or disabled, the letters of conservatorship limit powers to those of a guardian under the Uniform Veteran's Guardianship Act and require the conservator to file annual accounts.

The Court may not only limit the powers of the conservator but may expand his powers so as to make it possible for him to act as the Court itself might act.

**15-5-427. Preservation of estate plan.** — In investing the estate, and in selecting assets of the estate for distribution under subsections (a) and (b) of section 15-5-425 of this Part, in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court should take into account and preserve insofar as possible any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person. [I.C., § 15-5-427, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 21, p. 510.]

### JUDICIAL DECISIONS

#### ANALYSIS

Estate plan.

—Certificate of deposit.

—Known.

Procedure when validity of estate questioned.

**Estate Plan.****—Certificate of Deposit.**

A certificate of deposit containing a payable-on-death designation meets the statutory definition of “estate plan” because it is a contractual arrangement that transfers a benefit at the grantor’s death. *Old Nat’l Bank v. Tate*, 122 Idaho 401, 834 P.2d 1317 (1992).

**—Known.**

Because bank had no knowledge that grantor said anything to grantee regarding distribution of the proceeds of the certificate of deposit, any estate plan to that extent would not have been binding on bank because it was not known to the bank at time the CD matured; however, bank as conservator of grantor’s estate must account for its handling of CD, payable-on-death account, a known estate plan complete and valid on its face. Oral agreement between grantor and grantee of which bank had no knowledge does not change this. *Old Nat’l Bank v. Tate*, 122 Idaho

401, 834 P.2d 1317 (1992).

This section requires conservators to preserve only “known” estate plans. Obviously, conservators cannot be required to preserve estate plans of which they have no knowledge. *Old Nat’l Bank v. Tate*, 122 Idaho 401, 834 P.2d 1317 (1992).

**Procedure When Validity of Estate Questioned.**

When conservators in the administration of estates have knowledge of an estate plan valid and complete on its face, they must under this section take into account and preserve that estate plan insofar as possible. Once this is done, if a question arises as to validity of the estate plan either because of a perceived technical defect in its creation or because of allegations of incompetency on the part of the grantor, or undue influence or duress by others, recourse may be had in the courts by the conservator or any aggrieved party. *Old Nat’l Bank v. Tate*, 122 Idaho 401, 834 P.2d 1317 (1992).

**15-5-428. Claims against protected person — Enforcement. —**

(a) A conservator must pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim may be presented by either of the following methods: (1) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed; (2) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and deliver or mail a copy of the statement to the conservator. A claim is deemed presented on the first to occur of receipt by the conservator of a written statement of claim or the filing with the court of the written statement of claim. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within sixty (60) days after its presentation. The presentation of a claim tolls any statute of limitations relating to the claim until thirty (30) days after its disallowance.

(b) A claimant whose claim has not been paid may petition the court for determination of his claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

(c) If it appears that the estate in conservatorship is likely to be exhausted before all existing claims are paid, preference is to be given to prior claims for the care, maintenance and education of the protected person or his dependents and existing claims for expenses of administration. [I.C., § 15-5-428, as added by 1971, ch. 111, § 1, p. 233; am. 1972, ch. 201, § 22, p. 510.]



## RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, §§ 122, 123.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 62, 86, 101, 106.

**A.L.R.** — Right of guardian or committee of

incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval by court. 63 A.L.R.3d 780.

**15-5-429. Individual liability of conservator.** — (a) Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(b) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a conservator in his fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in his fiduciary capacity, whether or not the conservator is individually liable therefor.

(d) Any question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding or action. [I.C., § 15-5-429, as added by 1971, ch. 111, § 1, p. 233.]

## RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 185 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, §§ 97, 253.

**15-5-430. Termination of proceeding.** — The protected person, his personal representative, the conservator, or any other interested person may petition the court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedure as in an original proceeding for a protective order. The court, upon determining after notice and hearing that the minority or disability of the protected person has ceased or that it would be in the best interests of the protected person to establish the conservatorship in another jurisdiction may terminate the conservatorship and, where appropriate, order initiation of proceedings in another jurisdiction or delivery of the assets to a foreign conservator as set forth in chapters 9, 10 and/or 11, title 15, Idaho Code. Upon termination, title to assets of the estate passes to the former protected person or to his successor subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected person or his successors, to evidence the transfer. [I.C., § 15-5-430, as added by 1971, ch. 111, § 1, p. 233; am. 2006, ch. 182, § 3, p. 565.]

### STATUTORY NOTES

**Amendments.** — The 2006 amendment, 10 and/or 11, title 15, Idaho Code” at the end of the third sentence.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### Notice.

When guardianship is terminated by court, a reasonable notice should be given although notice is not required by the statute; but informal notice of that fact, brought home to

representative of guardian, who is apprised of such termination and of the reasons therefor, is sufficient to bind guardian. *Jain v. Priest*, 30 Idaho 273, 164 P. 364 (1917).

### RESEARCH REFERENCES

**Am. Jur.** — 39 Am. Jur. 2d, Guardian and Ward, § 74 et seq.

**C.J.S.** — 39 C.J.S., Guardian and Ward, § 36 et seq.

### COMMENT TO OFFICIAL TEXT

The persons entitled to notice of a petition to terminate a conservatorship are identified by Section 5-405.

Any interested person may seek the termination of a conservatorship when there is some question as to whether the trust is still needed. In some situations (e.g., the individ-

ual who returns after being missing) it may be perfectly clear that he is no longer in need of a conservatorship.

An order terminating a conservatorship may be recorded as evidence of the transfer of title from the estate. See 5-421.

**15-5-431. Payment of debt and delivery of property to foreign conservator without local proceedings.** — Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate or other like fiduciary appointed by a court of the state of residence of the protected person, upon being presented with proof of his appointment and an affidavit made by him or on his behalf stating:

(a) That no protective proceeding relating to the protected person is pending in this state, including any proceeding under chapters 9, 10 and/or 11, title 15, Idaho Code; and

(b) That the foreign conservator is entitled to payment or to receive delivery.

If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this state, payment or delivery in response to the demand and affidavit discharges the debtor or possessor. [I.C., § 15-5-431, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 16, p. 319; am. 2006, ch. 182, § 4, p. 565.]

### STATUTORY NOTES

**Amendments.** — The 2006 amendment, under chapters 9, 10 and/or 11, title 15, Idaho Code” at the end of subsection (a).

## RESEARCH REFERENCES

**C.J.S.** — 39 C.J.S., Guardian and Ward,  
§ 271 et seq.

## COMMENT TO OFFICIAL TEXT

Section 5-410(a) (1) [§ 15-5-410(1)(e)] gives a foreign conservator or guardian of property, appointed by the state where the disabled person resides, first [fifth] priority for appointment as conservator in this state. A

foreign conservator may easily obtain any property in this state and take it to the residence of the protected person for management.

**15-5-432. Powers or foreign conservator. [Repealed.]**

## STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 15-5-432, as added by 1972, ch. 201, § 23, p. 510, was repealed by S.L. 2006, ch. 183, § 5.

**15-5-433. Provisions for conservator of minor from age eighteen to age twenty-one.** — If so stated in the order appointing such conservator, or in any supplemental order entered prior to the time the minor reaches the age of eighteen (18) years, the conservator for a minor (said minor being hereinafter referred to as the "protected person") shall act until the protected person reaches the age of twenty-one (21) years, subject to the following provisions:

(a) The court may state in such order special terms and conditions for such conservator when acting while the protected person is of the age of eighteen (18) years or more, but less than the age of twenty-one (21) years;

(b) Upon reaching the age of eighteen (18) years, the protected person may, at any time thereafter, petition the court to terminate or modify the conservatorship prior to the protected person attaining the age of twenty-one (21) years. Said petition must be based on the ability of the minor to adequately manage his or her own financial affairs, demonstrated by appropriate evidence, including:

- (1) Demonstrated ability to manage his or her financial affairs;
- (2) Submission of budgets and other appropriate similar documents;
- (3) Employment history;
- (4) Educational history;
- (5) Criminal history; and
- (6) Other relevant evidence;

(c) The burden of showing such financial management ability shall be upon the protected person and must be demonstrated by clear and convincing evidence thereof; and

(d) The court may, in its discretion, order reports to be filed by the conservator, and/or a court visitor, and/or may appoint a guardian ad litem for the protected person.

The original determination of whether to extend the conservatorship to age twenty-one (21) years shall be within the discretion of the court and may be based on such factors as the court deems to be relevant to such determination. [I.C., § 15-5-433, as added by 1996, ch. 423, § 1, p. 1447.]



## STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**15-5-434. Guardian ad litem — Duties.** — Subject to the direction of the court, the guardian ad litem shall have the following duties, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first:

(1) To conduct an independent factual investigation of the circumstances of the protected person including, without limitation, the circumstances described in the petition;

(2) To file with the court a written report stating the results of the investigation, the guardian ad litem's recommendations, and such other information as the court may require. The guardian ad litem's written report shall be delivered to the court, with copies to all parties to the case, at least five (5) days before the date set for the adjudicatory hearing;

(3) To act as an advocate for the protected person for whom appointed at each stage of the proceedings under this chapter and to be charged with the general representation of the protected person. To that end, the guardian ad litem shall participate fully in the proceedings to the degree necessary to adequately represent the protected person, and shall be entitled to confer with the protected person and the protected person's immediate family including, but not limited to, spouse, parents, siblings, children and next of kin;

(4) To facilitate and negotiate to ensure that the court, the department of health and welfare, if applicable, and the protected person's attorney, if any, each fulfill their obligations to the protected person in a timely fashion;

(5) To monitor the circumstances of a protected person, if the protected person is found to be within the purview of this chapter, to assure compliance with the law, and to assure that the terms of the court's orders are being fulfilled and remain in the best interest of the protected person;

(6) To meet any parent or other person having legal or physical custody of the protected person, record the concerns of the parent, and report them to the court or, if no such meeting occurs, file an affidavit stating why no meeting occurred;

(7) To maintain all information regarding the case confidential and to not disclose such information except to the court or to other parties to the case;

(8) To determine whether existing powers, trusts, and other measures may adequately give the protected person the legal protection otherwise provided by a conservator, or whether such powers, trusts or other measures could be reasonably created and, if so, to recommend that either no conservatorship be granted or that only a suitably limited conservatorship be granted; and

(9) To exercise such other and further duties as may be expressly imposed by court order. [I.C., § 15-5-434, as added by 2005, ch. 49, § 3, p. 181.]

**15-5-435. Guardian ad litem — Rights and powers.** — (1) The guardian ad litem has the rights and powers set forth in this section, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first.

(2) The guardian ad litem shall have the right and power to file pleadings, motions, memoranda and briefs on behalf of the protected person, and to have all of the rights of the protected person, whether conferred by statute, rule of court, or otherwise.

(3) All parties to any proceeding under this chapter shall promptly notify the guardian ad litem, and the conservator's attorney, if any, of all hearings, staff hearings or meetings, investigations, depositions, and significant changes of circumstances of the protected person.

(4) Except to the extent prohibited or regulated by federal law, upon presentation of a copy of the order appointing the guardian ad litem, any person or agency including, without limitation, any hospital, school organization, department of health and welfare, doctor, nurse or other health care provider, psychologist, psychiatrist, police department, or mental health clinic, shall permit the guardian ad litem to inspect and copy pertinent records relating to the protected person necessary for the proceeding for which the guardian ad litem has been appointed. [I.C., § 15-5-435, as added by 2005, ch. 49, § 4, p. 181.]

## PART 5. POWERS OF ATTORNEY

### 15-5-501. Definition. [Repealed.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 15-5-501 (I.C., § 15-5-501, as added by 1973, ch. 167, § 17, p. 319) was repealed by S.L. 1982, ch. 138, § 1.

Another former section 15-5-501 comprising I.C., § 15-5-501, as added by S.L. 1971,

ch. 111, § 1, was repealed by S.L. 1972, ch. 201, § 24.

**Compiler's Notes.** — This section, which comprised I.C., § 15-5-501, as added by 1982, ch. 138, § 2, p. 391, was repealed by S.L. 2008, ch. 186, § 1. See § 15-12-101 et seq.

### 15-5-502. Durable power of attorney not affected by disability. [Repealed.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 15-5-502 (I.C., § 15-5-502, as added by 1971, ch. 111, § 1, p. 233) was repealed by S.L. 1982, ch. 138, § 1.

**Compiler's Notes.** — This section, which

comprised I.C., § 15-5-502, as added by 1982, ch. 138, § 2, p. 391, was repealed by S.L. 2008, ch. 186, § 1. See § 15-12-101 et seq.

**15-5-503. Relation of attorney in fact to court-appointed fiduciary. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 15-5-503, as added by 1982, ch. 138, § 2, p. 391, was repealed by S.L. 2008, ch. 186, § 1. See § 15-12-101 et seq.

**15-5-504. Power of attorney not revoked until notice. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 15-5-504, as added by 1982, ch. 138, § 2, p. 391, was repealed by S.L. 2008, ch. 186, § 1. See § 15-12-101 et seq.

**15-5-505. Proof of continuance of durable and other powers of attorney by affidavit. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 15-5-505, as added by 1982, ch. 138, § 2, p. 391, was repealed by S.L. 2008, ch. 186, § 1. See § 15-12-101 et seq.

**15-5-506. Uniformity of application and construction. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 15-5-506, as added by 1982, ch. 138, § 2, p. 391, was repealed by S.L. 2008, ch. 186, § 1. See § 15-12-101 et seq.

**15-5-507. Short title. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 15-5-507, as added by 1982, ch. 138, § 2, p. 391, was repealed by S.L. 2008, ch. 186, § 1. See § 15-12-101 et seq.

**15-5-508. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Compiler's Notes.** — Former § 15-5-508, was amended and redesignated as § 15-7-502 by S.L. 2000, ch. 178, § 1 and repealed by S.L. 2007, ch. 68, § 3.

**PART 6. BOARDS OF COMMUNITY GUARDIAN**

**15-5-601. Designation of boards of community guardian. —**  
(a) After making a determination that there exists a need within a county for a guardian for those persons in need of guardianship and for whom there is no person or corporation qualified and willing to act in such capacity, the board of county commissioners may create and budget for, within the county, a board of community guardian. The board of county commissioners of one or more counties within a judicial district may jointly create and budget for



a board of community guardian within that district. [I.C., § 15-5-601, as added by 1982, ch. 285, § 14, p. 719; am. 1987, ch. 320, § 1, p. 673; am. 1992, ch. 22, § 1, p. 71.]

### STATUTORY NOTES

**Cross References.** — General probate provisions, § 15-1-101 et seq.

General provisions concerning persons under disability, § 15-5-101 et seq.

Guardianship of incapacitated persons, § 15-5-301 et seq.

Guardianship of minors, § 15-5-201 et seq.

Protection of property of persons under disability and minors, § 15-5-401 et seq.

Treatment of the developmentally disabled, § 66-401 et seq.

Uniform Power of Attorney Act, § 15-12-101 et seq.

**Legislative Intent.** — Section 1 of S.L.

1982, ch. 285 read: "It is hereby declared by the legislature of the state of Idaho that disabled, aged or otherwise vulnerable adult citizens should be protected from exploitation, abuse and neglect through the availability of guardians and conservators having flexible powers and through the availability of volunteers to act as guardians or conservators where no other person is available to so serve."

**Compiler's Notes.** — The amendment of this section by S.L. 1987, ch. 320, § 1 deleted former subsections (b) and (c) and left the designation on subsection (a).

**15-5-602. Board structure — Powers and duties.** — (a) Any board of community guardian which is created within a county or counties in a judicial district shall operate under the laws of the state of Idaho, including the Idaho guardianship, conservatorship and trust laws.

(b) A board of community guardian shall consist of not fewer than seven (7) or more than eleven (11) members who are representatives of community interests involving persons needing guardians or conservators as defined by chapter 5, title 15, Idaho Code. Members shall be appointed by the board of county commissioners that created the board of community guardian under section 15-5-601, Idaho Code.

(1) The terms of the members of the board shall be for four (4) years and shall be staggered. A number of members equaling or most closely exceeding one-half (1/2) shall initially be appointed for three (3) years. Any vacancy created by resignation or expiration of term shall be filled in the same manner as the original appointment;

(2) No person shall be appointed for more than three (3) successive terms or twelve (12) successive years on the board; provided however, that the limitations expressed in this paragraph do not prohibit a person from continuing to serve on the board until that person's successor is appointed;

(3) The board shall meet not less than once each quarter;

(4) No person shall be a member of a board who is also an employee of the district court or the clerk of the district court;

(5) A board member having previously provided or currently providing services to a ward shall disclose such to the board and abstain from any decision or action taken concerning that particular ward;

(6) Board members and officers shall serve without pay;

(7) Each board shall elect its own chairman and other officers.

(c) A board, in those instances when a guardian and/or conservator is required and no qualified family member or other qualified person has volunteered to serve, may:

- (1) Locate a qualified person to serve as guardian and/or conservator; or
- (2) Petition the court to be appointed guardian and/or conservator.

(d) The board shall have all the powers and duties where applicable by court order, as provided under section 15-5-312, Idaho Code, and/or sections 15-5-408 and 15-5-424, Idaho Code, and in addition thereto shall:

- (1) Locate and recommend to the court, where necessary, that a visitor be appointed as provided in section 15-5-503 [15-5-303], Idaho Code;
- (2) Have access to all confidential records, including abuse registry reports that may be maintained by state or private agencies or institutions, which records concern a person for whom the board acts as guardian and/or conservator. The name of the person reporting the alleged abuse shall be subject to disclosure according to chapter 3, title 9, Idaho Code;
- (3) Review and monitor the services provided by public and private agencies to any incapacitated person for whom the board acts as guardian and/or conservator and determine the continued need for those services;
- (4) Assess a fee for services developed pursuant to this part;
- (5) Have the power, subject to the approval of the board of county commissioners, to adopt such rules as are necessary to carry out the duties and responsibilities of the board.

(e) When a board serves as guardian or conservator, it shall be compensated as other guardians or conservators pursuant to Idaho law. If, at the time the board is appointed as guardian and/or conservator, the incapacitated person for whom the board is to act has no funds, the court may waive the payment of fees.

(f) When a board serves as guardian and/or conservator there is created, at the time of filing of the order of appointment, a lien in favor of the board against any real property owned by the ward or protected person, enforceable only upon the termination of the guardianship and/or conservatorship, for all fees which were incurred throughout the duration of the services and which were not paid prior to termination. All fees incurred throughout the duration of the services and which were not paid prior to the termination of services shall relate back to the effective date of the lien. The board must record a notice of said lien within thirty (30) days of filing of the order of appointment. Such liens shall be recorded in every county where property subject to the lien is located. The notice shall contain at least the following information: full court heading of the action in which the appointment was made; the effective date of the lien; the name and address of the board; and any limitations or terms regarding the fees covered by the lien contained in the order of appointment. The court may postpone or arrange for gradual repayment of the fees if the court finds that the immediate repayment would create a hardship on the person.

(g) No member of a board of community guardian, any employees, or any visitor appointed at the request of such board pursuant to section 15-5-303, Idaho Code, shall be liable for civil damages by reason of authorizing

medical treatment or surgery for the person for whom the board is appointed, if the board member, employee or visitor, after medical consultation with the person's physician, acts in good faith, is not negligent, and acts within the limits established for the guardian and/or conservator by the court. No such person shall be liable, by reason of his authorization, for injury to the person for whom the guardian and/or conservator has been appointed which injury results from the negligence or other acts of a third person, if the court has authorized the giving of medical consent by the board or the individual members of the board. No such person shall be liable in the performance of acts done in good faith within the scope of his authority as long as the act is not of a wanton or grossly negligent nature. The board of community guardian shall be deemed to be a governmental entity for the purposes of application of the Idaho tort claims act. [I.C., § 15-5-602, as added by 1982, ch. 285, § 14, p. 719; am. 1987, ch. 320, § 2, p. 673; am. 1990, ch. 213, § 8, p. 480; am. 1993, ch. 24, § 1, p. 83; am. 2001, ch. 97, § 1, p. 245.]

#### STATUTORY NOTES

**Cross References.** — Idaho tort claims act, § 6-901 et seq.

**Compiler's Notes.** — The bracketed insertion in subsection (d)(1) was added by the compiler to correct the statutory reference which was incorrect in the original act.

**Effective Dates.** — Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**15-5-603. Annual report.** — (a) Each board shall report annually in writing to the board of county commissioners and, in the case of a multi-county board, to each participating county, its activities for the preceding year, which report shall contain:

- (1) A fiscal report which adequately reflects the financial operation of the board;
- (2) The number of volunteer guardians obtained by the board;
- (3) The number of incapacitated persons for whom the board is acting as guardian;
- (4) Recommendations for improving guardianship services in the circuit;
- (5) Such other matters as may be determined advisable by the board or the board of county commissioners.

The report shall be filed no later than April 1 of each year and shall cover the preceding calendar year.

(b) The board of county commissioners shall review each report and shall determine whether to dissolve or continue the board of community guardian in the county. Where there is a multi-county board of community guardian, the boards of county commissioners of all concerned counties must concur in a decision to dissolve the board of community guardian. [I.C., § 15-5-603, as added by 1982, ch. 285, § 14, p. 719; am. 1987, ch. 320, § 3, p. 673.]



## CHAPTER 6

## NONPROBATE TRANSFERS

## PART 1. MULTIPLE-PARTY ACCOUNTS

## SECTION.

- 15-6-101. Definitions.
- 15-6-102. Ownership as between parties, and others — Protection of financial institutions.
- 15-6-103. Ownership during lifetime.
- 15-6-104. Right of survivorship.
- 15-6-105. Effect of written notice to financial institution.
- 15-6-106. Accounts and transfers nontestamentary.
- 15-6-107. Liability of nonprobate transferees for creditor claims and statutory allowances.
- 15-6-108. Financial institution protection — Payment on signature of one party.
- 15-6-109. Financial institution protection — Payment after death or disability — Joint account.
- 15-6-110. Financial institution protection — Payment of P.O.D. account.
- 15-6-111. Financial institution protection — Payment of trust account.
- 15-6-112. Financial institution protection — Discharge.
- 15-6-113. Financial institution protection — Setoff.

## PART 2. PROVISIONS RELATING TO EFFECT OF DEATH

- 15-6-201. Provisions for payment or transfer at death.

## PART 3. UNIFORM TOD SECURITY REGISTRATION ACT

## SECTION.

- 15-6-301. Definitions.
- 15-6-302. Registration in beneficiary form — Sole or joint tenancy ownership.
- 15-6-303. Registration in beneficiary form — Applicable law.
- 15-6-304. Origination of registration in beneficiary form.
- 15-6-305. Form of registration in beneficiary form.
- 15-6-306. Effect of registration in beneficiary form.
- 15-6-307. Ownership on death of owner.
- 15-6-308. Protection of registering entity.
- 15-6-309. Nontestamentary transfer on death.
- 15-6-310. Terms, conditions and forms for registration.
- 15-6-311. Short title — Rules of construction.
- 15-6-312. Application of part.

## PART 4. COMMUNITY PROPERTY RIGHT OF SURVIVORSHIP

- 15-6-401. Community property with right of survivorship in real property.
- 15-6-402. Termination of community property with right of survivorship in real property.

## PART 1. MULTIPLE-PARTY ACCOUNTS

**15-6-101. Definitions.** — In this Part, unless the context otherwise requires:

(1) “Account” means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account and other like arrangement;

(2) “Beneficiary” means a person named in a trust account as one for whom a party to the account is named as trustee;

(3) “Financial institution” means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions;

(4) “Joint account” means an account payable on request to one (1) or more of two (2) or more parties whether or not mention is made of any right of survivorship;

(5) A “multiple-party account” is any of the following types of account:

(a) a joint account;

- (b) a P.O.D. account; or
- (c) a trust account.

It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one (1) or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposit agreement;

(6) "Net contribution" of a party to a joint account as of any given time is the sum of all deposits thereto made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question;

(7) "Party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee. Unless the context otherwise requires, it includes a guardian, conservator, personal representative, or assignee, including an attaching creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal;

(8) "Payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any set-off, or reduction or other disposition of all or part of an account pursuant to a pledge;

(9) "Proof of death" includes a death certificate or record or report which is prima facie proof of death under section 15-1-107 of this code;

(10) "P.O.D. account" means an account payable on request to one (1) person during his lifetime and on his death to one (1) or more P.O.D. payees, or to one (1) or more persons during their lifetimes and on the death of all of them to one (1) or more P.O.D. payees;

(11) "P.O.D. payee" means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one (1) or more persons;

(12) "Request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institutions; but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this part the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal;

(13) "Sums on deposit" means the balance payable on a multiple-party account including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party;

(14) "Trust account" means an account in the name of one (1) or more parties as trustee for one (1) or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client;

(15) "Withdrawal" includes payment to a third person pursuant to check or other directive of a party. [I.C., § 15-6-101, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

JUDICIAL DECISIONS

ANALYSIS

Account.  
Beneficiary.  
Certificate of deposit.  
Financial institutions.  
Pledge of account.

**Account.**

Investments in stocks through a broker, whether held in investor's or brokerage name, are not the "deposit of funds" in a "financial institution" contemplated in the definition of "account." Estate of Bogert, 96 Idaho 522, 531 P.2d 1167 (1975).

**Beneficiary.**

The deceased depositor's former spouse, who had been listed as the account beneficiary, waived any claim to the individual retirement account (IRA) as part of a property settlement agreement during the divorce which provided that the IRA would be awarded to the husband "free and clear of any claims." Johnson v. Johnson, 113 Idaho 602, 746 P.2d 1061 (Ct. App. 1987).

**Certificate of Deposit.**

A certificate deposit containing a payable-on-death designation meets the statutory definition of "estate plan" because it is a contractual arrangement that transfers a benefit at

the grantor's death. Old Nat'l Bank v. Tate, 122 Idaho 401, 834 P.2d 1317 (1992).

**Financial Institutions.**

Plaintiff did not provide sufficient proof in support of his claim that stock brokerage firms may indeed be found to be financial institutions as contemplated by subdivision (3) of this section. Ashe v. Hurt, 117 Idaho 266, 787 P.2d 252 (1990).

**Pledge of Account.**

Ordinarily, where a person borrows money from a savings institution in which that person is party to an account and pledges the deposits in that account as security for that loan, the pledge is effective as a payment of that account and the financial institution is discharged from all claims for amounts so paid so long as the loan remains unpaid. Smith v. Idaho State Univ. Fed. Credit Union, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982).

**Cited in:** Erhardt v. Leonard, 104 Idaho 197, 657 P.2d 494 (Ct. App. 1983).

RESEARCH REFERENCES

**Am. Jur.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 681 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 640, 641.



89 C.J.S., Trusts, § 57.

**A.L.R.** — Bank's right to apply or setoff deposit against debt of depositor not due at time of his death. 7 A.L.R.3d 908.

Bank's right to apply third person's funds, deposited in debtor's name, on debtor's obligation. 8 A.L.R.3d 235.

Attachment, garnishment, or execution by creditor of one of the joint depositors. 11 A.L.R.3d 1465.

Creation of joint savings account or savings certificate as gift to survivor. 43 A.L.R.3d 971.

Revocation of tentative ["Totten"] trust of savings bank account by inter vivos declaration or will. 46 A.L.R.3d 487.

Inclusion of funds in savings bank trust (Totten Trust) in determining surviving

spouse's interest in decedent's estate. 64 A.L.R.3d 187.

Manner and sufficiency of revocation of tentative ["Totten"] trust of savings bank account. 64 A.L.R.3d 221.

Death of beneficiary as terminating or revoking trust of savings bank account over which settlor retains right of withdrawal or revocation. 64 A.L.R.3d 221.

Bank's right of setoff, based on debt of one depositor, against funds in account standing in names of debtor and another. 68 A.L.R.3d 122.

Liability of bank to joint depositor of savings account for amounts withdrawn by other joint depositor without presentation of passbook. 35 A.L.R.4th 1094.

### COMMENT TO OFFICIAL TEXT

This and the sections which follow are designed to reduce certain questions concerning many forms of joint accounts and the so-called Totten trust account. An account "payable on death" is also authorized.

As may be seen from examination of the sections that follow, "net contribution" as defined by subsection (f) [(6)] has no application to the financial institution-depositor relationship. Rather, it is relevant only to controver-

sies that may arise between parties to a multiple-party account.

Various signature requirements may be involved in order to meet the withdrawal requirements of the account. A "request" involves compliance with these requirements. A "party" is one to whom an account is presently payable without regard for whose signature may be required for a "request."

**15-6-102. Ownership as between parties, and others — Protection of financial institutions.** — The provisions of sections 15-6-103 through 15-6-105 of this Part concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts. The provisions of sections 15-6-108 through 15-6-113 of this Part govern the liability of financial institutions who make payments pursuant thereto, and their set-off rights. [I.C., § 15-6-102, as added by 1971, ch. 111, § 1, p. 233.]

### JUDICIAL DECISIONS

#### Joint Savings Account.

A joint savings account is a contractual agreement between a financial institution and the named depositors. Account contracts define the power of withdrawal held by each party to the account, as a means of protecting

the financial institution, but the actual ownership of the funds in the account is not affected by the account contract. *Erhardt v. Leonard*, 104 Idaho 197, 657 P.2d 494 (Ct. App. 1983).

### COMMENT TO OFFICIAL TEXT

This section organizes the sections which follow into those dealing with the relationship between parties to multiple-party accounts on the one hand, and those relating to the finan-

cial institution-depositor (or party) relationship, on the other. By keeping these relationships separate, it is possible to achieve the degree of definiteness that financial institu-

tions must have in order to be induced to offer multiple-party accounts for use by their customers, while preserving the opportunity for individuals involved in multiple-party accounts to show various intentions that may have attended the original deposit, or any unusual transactions affecting the account thereafter. The separation thus permits indi-

viduals using accounts of the type dealt with by these sections to avoid unconsidered and unwanted definiteness in regard to their relationship with each other. In a sense, the approach is to implement a layman's wish to "trust" a co-depositor by leaving questions that may arise between them essentially unaffected by the form of the account.

**15-6-103. Ownership during lifetime.** — (a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if two (2) or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (a) of this section.

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two (2) or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subsection (a) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary. [I.C., § 15-6-103, as added by 1971, ch. 111, § 1, p. 233.]

JUDICIAL DECISIONS

ANALYSIS

Actual ownership.  
Effect of joint account agreement.

**Actual Ownership.**

A joint savings account is a contractual agreement between a financial institution and the named depositors. Account contracts define the power of withdrawal held by each party to the account, as a means of protecting the financial institution, but the actual ownership of the funds in the account is not affected by the account contract. *Erhardt v. Leonard*, 104 Idaho 197, 657 P.2d 494 (Ct. App. 1983).

Where a grandmother opened a joint savings account with her grandson but only the grandmother made contributions to the sums on deposit in the account, absent clear and convincing proof of a contrary intent, the grandmother was the sole owner of the funds

in the account, and the grandson's withdrawal of the total funds in the account was an invasion of her property. *Erhardt v. Leonard*, 104 Idaho 197, 657 P.2d 494 (Ct. App. 1983).

**Effect of Joint Account Agreement.**

Establishment of a joint account may effect a gift by the depositor to the other party or parties to the account. In determining the effect of a joint account agreement, the significant consideration is the intent of the depositor, and the party asserting that a gift was intended must prove all the elements of a gift, excepting irrevocable delivery, by clear and convincing evidence. *Erhardt v. Leonard*, 104 Idaho 197, 657 P.2d 494 (Ct. App. 1983).

COMMENT TO OFFICIAL TEXT

This section reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually

intends no present change of beneficial ownership. The assumption may be disproved by proof that a gift was intended. Read with Section 6-101(6) which defines "net contributions," the section permits parties to certain



kinds of multiple-party accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them. It is important to note that the section is limited to describe ownership of an account while original parties are alive. Section 6-104 prescribes what happens to beneficial ownership on the death of a party. The section does not undertake to describe the situation between parties if one withdraws more than he is then entitled to as against the other party. Sections 6-108 and 6-112 protect a financial institution in such circumstances without reference to whether a withdrawing party may be entitled to less than he withdraws as against another party. Presumably, overwithdrawal leaves the party making the excessive withdrawal liable to the beneficial owner as a debtor or trustee. Of course, evidence of intention by one to make a gift to the other of any sums withdrawn by the other in excess of his ownership should be effective.

The final Code contains no provision dealing with division of the account when the parties fail to prove net contributions. The omission is deliberate. Undoubtedly a court would divide the account equally among the parties to the extent that net contributions cannot be proven; but a statutory section explicitly embodying the rule might undesirably narrow the possibility of proof of partial contributions and might suggest that gift tax consequences applicable to creation of a joint tenancy should attach to a joint account. The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals; the right of survivorship which attaches unless negated by the form of the account really is a right to the values theretofore owned by another which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.

**15-6-104. Right of survivorship.** — (a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent if an intent to give the account can be shown by the surviving party or parties. If there are two (2) or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under section 15-6-103 of this Part augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account, on death of the original payee or of the survivor of two (2) or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one (1) or more die before the original payee; if two (2) or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a trust account, on death of the trustee or the survivor of two (2) or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one (1) or more die before the trustee, unless there is clear and convincing evidence of a contrary intent; if two (2) or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

(e) A right of survivorship arising from the express terms of the account or under this section, if an intent to give can be shown, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be



changed by will. [I.C., § 15-6-104, as added by 1971, ch. 111, § 1, p. 233; am. 1971, ch. 126, § 1, p. 487; am. 1972, ch. 201, § 25, p. 510.]

STATUTORY NOTES

**Compiler’s Notes.** — When referring to the “Comment to Official Text” as it pertains to subsection (a), the user should note that Idaho did not adopt the official version of this subsection. The version of subsection (a) as set out in this section provides that sums remaining on deposit in a joint account belong to the surviving party or parties if an intent to give the account can be shown. The official

version of subsection (a) provides that such sums will go to the surviving party or parties “unless there is clear and convincing evidence of a different intention at the time the account is created” (emphasis added).

**Effective Dates.** — Section 27, S.L. 1972, ch. 201, provided that this act should be in full force and effect on and after July 1, 1972.

JUDICIAL DECISIONS

ANALYSIS

Application.  
Donative intent.  
Waiver.

**Application.**

This section does not apply to investments in stocks through a brokerage firm regardless of whether stocks are in the name of investor or broker. Estate of Bogert, 96 Idaho 522, 531 P.2d 1167 (1975).

**Donative Intent.**

The enactment of the Uniform Probate Code did not modify the requirement that a noncontributing surviving joint tenant who claims a right to the proceeds of a joint savings account by right of survivorship must establish the decedent’s donative intent by clear and convincing evidence. In re Estate of

Lewis, 97 Idaho 299, 543 P.2d 852 (1975).

**Waiver.**

The deceased depositor’s former spouse, who had been listed as the account beneficiary, waived any claim to the individual retirement account (IRA) as part of a property settlement agreement during the divorce which provided that the IRA would be awarded to the husband “free and clear of any claims.” Johnson v. Johnson, 113 Idaho 602, 746 P.2d 1061 (Ct. App. 1987).

**Cited in:** Greene v. Cooke, 96 Idaho 48, 524 P.2d 176 (1973); Ashe v. Hurt, 117 Idaho 266, 787 P.2d 252 (1990).

COMMENT TO OFFICIAL TEXT

The effect of (a) of this section, when read with the definition of “joint account” in 6-101(4), is to make an account payable to one or more of two or more parties a survivorship arrangement unless “clear and convincing evidence of a different contention” is offered.

The underlying assumption is that most persons who use joint accounts want the survivor or survivors to have all balances remaining at death. This assumption may be questioned in states like Michigan where existing statutes and decisions do not provide any safe and wholly practical method of establishing a joint account which is not survivorship. See Leib v. Genesee Merchants Bank, 371 Mich. 89, 123 N.W.(2d) 140 (1962). But, use of a form negating survivorship would make (d) of this section applicable. Still, the financial institution which paid after the death of a party would be protected by 6-108 and 6-109. Thus, a safe

nonsurvivorship account form is provided. Consequently, the presumption stated by this section should become increasingly defensible.

The section also is designed to apply to various forms of multiple-party accounts which may be in use at the effective date of the legislation. The risk that it may turn nonsurvivorship accounts into unwanted survivorship arrangements is meliorated by various considerations. First of all, there is doubt that many persons using any form of multiple name account would not want survivorship rights to attach. Secondly, the survivorship incidents described by this section may be shown to have been against the intention of the parties. Finally, it would be wholly consistent with the purpose of the legislation to provide for a delayed effective date so that financial institutions could get notices to customers warning them of possible

review of accounts which may be desirable because of the legislation.

Subsection (c) accepts the New York view that an account opened by "A" in his name as "trustee for B" usually is intended by A to be an informal will of any balance remaining on deposit at his death. The section is framed so that accounts with more than one "trustee," or more than one "beneficiary" can be accommodated. Section 6-103(c) would apply to such an account during the lifetimes of "all parties." "Party" is defined by 6-101 (7) so as to exclude a beneficiary who is not described by the account as having a present right of withdrawal.

In the case of a trust account for two or

more beneficiaries, the section prescribes a presumption that all beneficiaries who survive the last "trustee" to die own equal and undivided interests in the account. This dovetails with Sections 6-111 and 6-112 which give the financial institution protection only if it pays to all beneficiaries who show a right to withdraw by presenting appropriate proof of death. No further survivorship between surviving beneficiaries of a trust account is presumed because these persons probably have had no control over the form of the account prior to the death of the trustee. The situation concerning further survivorship between two or more surviving parties to a joint account is different.

**15-6-105. Effect of written notice to financial institution.** — The provisions of section 15-6-104 of this Part as to rights of survivorship are determined by the form of the account at the death of a party. This form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime. [I.C., § 15-6-105, as added by 1971, ch. 111, § 1, p. 233.]

#### COMMENT TO OFFICIAL TEXT

It is to be noted that only a "party" may issue an order blocking the provisions of Section 6-104. "Party" is defined by Section 6-101(7). Thus if there is a trust account in

the name of A or B in trust for C, C cannot change the right of survivorship because he has no present right of withdrawal and hence is not a party.

**15-6-106. Accounts and transfers nontestamentary.** — Any transfers resulting from the application of section 15-6-104 of this chapter are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to chapters 1 through 4 of this code. [I.C., § 15-6-106, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

#### COMMENT TO OFFICIAL TEXT

The purpose of classifying the transactions contemplated by Article VI [Chapter 6] as nontestamentary is to bolster the explicit statement that their validity as effective

modes of transfers at death is not to be determined by the requirements for wills. The section is consistent with Part 2 of Article VI [Chapter 6].

**15-6-107. Liability of nonprobate transferees for creditor claims and statutory allowances.** — (1) In this section, "nonprobate transfer" means a valid transfer effective at death, other than of a survivorship

interest in a joint tenancy of real estate, by a transferor whose last domicile was in this state to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor to apply it to discharge claims against the transferor's probate estate.

(2) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to the decedent's probate estate for allowed claims against the decedent's probate estate and statutory allowances to the decedent's surviving spouse, minor children and dependent children to the extent the decedent's probate estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

(3) Nonprobate transferees are liable for the insufficiency described in subsection (2) of this section in the following order:

(a) As provided in the decedent's will or any other governing instrument;

(b) To the extent of the value of the nonprobate transfer received or controlled by the trustee of a trust serving as the principal nonprobate instrument in the decedent's estate plan as shown by its designation as devisee of the decedent's residuary estate or by other facts or circumstances;

(c) Other nonprobate transferees, in proportion to the values received.

(4) Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section shall abate as necessary to satisfy the liability as if all of the trust instruments were a single will and the interests were devised under it.

(5) A provision made in one (1) instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one (1) instrument conflicts with a provision in another, the later one prevails.

(6) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this state, wherever the transferee is located.

(7) A proceeding under this section may not be commenced unless the personal representative of the decedent's estate has received from the surviving spouse or one acting for a minor or dependent child, to the extent that statutory allowances are affected, or a creditor, a written demand for the proceeding. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent's estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(8) A proceeding under this section must be commenced within two (2) years after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within sixty (60) days after final allowance of the claim.

(9) Unless a written notice asserting that a decedent's probate estate is insufficient to pay allowed claims and statutory allowances has been



received from the decedent's personal representative the following rules apply:

(a) Payment or delivery of assets by a financial institution, registrar or other obligor to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

(b) A trustee receiving or controlling a nonprobate transfer is released from liability under this section on any assets distributed to the trust's beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee's liability attributable to that asset imposed by subsections (2) and (3) of this section. [I.C., § 15-6-107, as added by 2003, ch. 61, § 2, p. 207.]

### STATUTORY NOTES

**Prior Laws.** — Former section 15-6-107, comprising I.C., § 15-6-107, as added by 1971, ch. 111, § 1, p. 233, was repealed by S.L. 2003, ch. 61, § 1.

**Compiler's Notes.** — Article 6 of the Uniform Probate Code was completely revised by the National Conference of Commissioners on Uniform State Laws in 1989. The State of Idaho did not adopt the 1989 revision of

Article 6. However, in 2003, the Idaho legislature adopted the 1998 amendment of section 6-102 of revised Article 6, with minor changes to reflect Idaho probate law, to replace Section 6-107, Rights of Creditors, from the original 1971 adoption of the Uniform Probate Code. The Comment below is taken from the 1998 revision of Section 6-102 of the Revised Article 6.

### COMMENT TO OFFICIAL TEXT

1. Added to the Code in 1998 [2003], this section clarifies that the recipients of nonprobate transfers can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is inadequate. The maximum liability for a single nonprobate transferee is the value of the transfer. Values are determined under subsection (b) [(2)] as of the time when the benefits are "received or controlled by the transferee." This would be the date of the decedent's death for nonprobate transfers made by means of a revocable trust, and date of receipt for other nonprobate transfers. Two or more transferees are severally liable for the proportion of the liability based on the value of transfers received by each.

This section replaces Section 6-107 [15-6-107] of the original Code, and its 1989 sequel, 6-215. To the extent a deceased party's probate estate was insufficient, these sections made a deceased party's interest in multiple name accounts in financial institutions passing outside probate liable for the deceased party's statutory allowances and creditor claims. Assets passing at death by revocable trust or TOD asset registration agreements were not covered by these sections. Also, Section 6-201(b) [15-6-201(b)] of the original Code and its 1989 sequel, 6-101(b), provided merely that the section did not limit any other rights that might exist. Neither section created any rights.

If there are no probate assets, a creditor or other person seeking to use this Section 6-102 [15-6-107] would first need to secure appointment of a personal representative to invoke Code procedures for establishing a creditor's claim as "allowed." The use of probate proceedings as a prerequisite to gaining rights for creditors against nonprobate transferees has been a feature of UPC Article VI [Chapter 6] since originally approved in 1969. It works well in practice. The Article III [Chapter 3] procedures for opening estates, satisfying probate exemptions, and presenting claims are very efficient.

2. Section 6-102 [15-6-107] replaces Section 6-215 with coverage designed to extend the principle of Section 6-215 to transfers at death by revocable trust, TOD security registration agreements and similar death benefits not insulated from decedents' creditors or statutory allowances by other legislation. The initial clause of subsection (b) [(2)], "Except as otherwise provided by statute," is designed to prevent a conflict with and to clarify that this section does not supersede existing legislation protecting death benefits in life insurance, retirement plans or IRAs from claims by creditors.

If a state's insurance laws do not exempt or protect a particular insurance death benefit, the insured's creditors would not be able to establish a "nonprobate transfer" under (a)

[(1)] except to the extent of any cash surrender value generated by premiums paid by the insured that the insured could have obtained immediately before death. Note, also, that (i)(1) [(9)(a)] would protect a life insurance company that paid a death benefit before receiving written notice from the decedent's personal representative.

3. The definition of "nonprobate transfer" in subsection (a) [(1)] includes revocable transfers by a decedent; it does not include a transfer at death incident to a decedent's exercise or non-exercise of a presently exercisable general power of appointment created by another person. The drafters decided against including such powers even though presently exercisable general powers of appointment are subject to the Code's augmented estate provisions dealing with protection of a surviving spouse from disinheritance. Spousal protection against disinheritance by the other spouse supports the institution of marriage; creditors are better able to fend for themselves than financially disadvantaged surviving spouses. In addition, a presently exercisable general power of appointment created by another person is commonly viewed as a provision in the trust creator's instrument designed to provide flexibility in the estate plan rather than as a gift to the donee.

4. The required ability to revoke or otherwise prevent a nonprobate transfer at death that is vital to application of subsection (a) [(1)] is described as a "power," a word intended by the drafters to signify legal authority rather than capacity or practical ability. This corresponds to the definition in Code Section 2-201(6).

5. The exclusion of a "survivorship interest in joint tenancy of real estate" from the definition of "nonprobate transfer" in subsection (a) [(1)] is contrary to the law of some states (e.g., South Dakota) that allow an insolvent decedent's creditors to reach the share the decedent could have received prior to death by unilateral severance of the joint tenancy. The law in most other states is to the contrary. By excluding real estate joint tenancies, stability of title and ease of title examination is preserved. Moreover, real estate joint tenancies have served for generations to keep the share of a couples' real estate owned by the first to die out of probate and away from estate creditors. This familiar arrangement need not be disturbed incident to expanding the ability of decedents' creditors to reach newly recognized nonprobate transfers at death.

No view is expressed as to whether a survivorship interest in personal or intangible property registered in two or more names as joint tenants with right of survivorship would come within 6-102(a) [15-6-102(1)]. The outcome might depend on who originated the

registration and whether severance by any co-owner acting alone was possible immediately preceding a co-owner's death.

6. A feature of replaced Section 6-215 that was clarified by 1991 technical amendment protects a survivor beneficiary of a joint account from liability to the probate estate of a deceased co-depositor for funds in the account owned by the survivor prior to decedent's death. Subsection (a) [(1)] continues this protection by use of the language "valid transfer effective at death ... by a transferor ... [who] had power, acting alone, to prevent the transfer by revocation or withdrawal and instead use the property for the benefit of the transferor ...". Section 6-211 and related sections of the Code make it clear that parties to a joint and survivor account separately own values in the account in proportion to net contributions. Hence, a surviving joint account depositor who had contributed to the balance on deposit prior to the death of the other party is subject to the remedies described in this section only to the extent of new account values gained through survival of the decedent.

7. Transferees of nonprobate transfers subject to the possible liability described in subsection (b) include trustees of revocable trusts to the extent of assets transferred to the trust before death that were subject to the decedent's sole power to revoke. Such assets would be valued as of the date of death. While the trustee of an irrevocable trust, or of a trust that may be revoked only by the settlor and another person would ordinarily not be subject to this section, this section could apply if the trust is named as a beneficiary of a nonprobate transfer, such as of securities registered in TOD form. Under subsection (b) [(2)], such a transfer would involve a possibility of trust liability based on the value of the TOD transfer as of the time of its receipt. Liability under this section incurred by a trustee is a trust liability for which the trustee does not incur personal liability except as provided by UPC Section 3-808(b) [15-3-808(b)].

8. Trusts and non-trust recipients of nonprobate transfers incur liability in the order described in subsection (c) [(3)]. Note that either a revocable or an irrevocable trust might be designated devisee of a pour-over provision that would make the trust the "principal non-probate instrument in the decedent's estate plan" and, consequently, make it liable under subsection (c)(2) [(3)(b)] ahead of other nonprobate transferees to the extent of values acquired by a transfer at death as described in subsection (a) [(1)]. Note, too, that nothing would pass to the receptacle trust by the pour-over devise if all probate estate assets are used to discharge statutory allowances and claims. However, the fact that



the trust was designated to receive a pour-over devise signals that the trust probably includes the equivalent of a residuary clause measuring benefits by available assets and signaling probable intention of the settlor that residuary benefits should abate to pay the settlor's debts prior to other trust gifts.

9. The abatement order among classes of beneficiaries of trusts specified by subsection (d) [(4)] applies to all trusts subject to liability to the extent of nonprobate transfers received or administered whether or not the trust instrument is the principal nonprobate instrument in the decedent's estate plan. The drafters decided against a cross-reference to the Code's abatement provision, Section 3-902 [15-3-902], in part because that section deals with intestate and partially intestate estates as well as estates governed by wills. Note, too, that trusts for successive beneficiaries also will be governed by income and principal accounting principles that will serve to resolve some abatement issues.

10. Subsection (e) [5] recognizes that a number of separate instruments and transactions, executed at different times and with or without internal references linking them to other documents, may constitute the paperwork describing succession to a decedent's assets by probate and nonprobate methods. By authorizing control of abatement among gifts made by various transfers at death by the last executed instrument, the subsection permits a simple, last-minute override of earlier directions concerning a decedent's wishes regarding priorities among successors. Thus, a will or trust amendment can correct or avoid liquidity and abatement problems discovered prior to death. The expression "block buster will" was coined by estate planners in the mid-70's to signal interest in legislation enabling a later will to override death benefits by any nonprobate transfer device. This subsection meets some of the goals of advocates of this legislation.

11. Subsection (f) [(6)] builds on the principle employed in the Code's augmented estate provisions (UPC §§ 2-201 — 2-214) in relation to nonprobate transfers made to persons in other states, possibly by transactions governed by laws of other states. The underlying principle is that the law of a decedent's last domicile should be controlling as to rules of public policy that override the decedent's power to devise the estate to anyone the decedent chooses. The principle is implemented by subjecting donee recipients of the decedent to liability under the decedent's

domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should collection proceedings be necessary.

12. The first and third sentences of subsection (g) [(7)] are identical to sentences now appearing in UPC Section 6-215, which this section replaces. The second sentence is new. It reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants. A creditor whose claim has been allowed but remains unsatisfied and whose demand for a proceeding has been turned down by the estate fiduciary may proceed at personal risk in efforts to enforce the estate claim against the nonprobate beneficiary. This is so because the last two sentences of (g) [(7)] shift the risk of unrecoverable costs from the decedent's estate to the claimant who undertakes collection efforts on behalf of the decedent's estate. Any recovery of costs should be used to reimburse the claimant who bore the risk of loss for the proceeding. A personal representative tempted to decline a demand for a proceeding should note that the "good faith" standard of this section must be determined in light of the fiduciary responsibility imposed by UPC Section 3-703 [15-3-703].

13. Subparagraph (h) [(8)] meshes with time limits in the Code's sections governing allowance and disallowance of claims. See Sections 3-804 [15-3-804] and 3-806 [15-3-806].

14. Subsection (i)(1) [(9)(a)] is designed to protect issuers of TOD security registrations who make payments or delivery to designated death beneficiaries before receiving notice from the decedent's probate estate of a probable insolvency. These entities are not "transferees" subject to liability under subsection (b) [(2)], but they might incur legal or other costs if the beneficiaries request payment in spite of warning notices from estate fiduciaries.

Subsection (i)(2) [(9)(b)] is designed to enable trustees handling nonprobate transfers to distribute trust assets in accordance with trust terms if no warning of probable estate insolvency has been received. Beneficiaries receiving distributions from a trustee take subject to personal liability in the amount and priority of the trustee based on the value distributed.

**15-6-108. Financial institution protection — Payment on signature of one party.** — Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts.



Any multiple-party account may be paid, on request, to any one (1) or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions. [I.C., § 15-6-108, as added by 1971, ch. 111, § 1, p. 233.]

#### JUDICIAL DECISIONS

**Cited in:** *Greene v. Cooke*, 96 Idaho 48, 524 P.2d 176 (1973); *Smith v. Idaho State Univ.* Fed. Credit Union, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982).

**15-6-109. Financial institution protection — Payment after death or disability — Joint account.** — Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proofs of death are presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under section 15-6-104 of this Part. [I.C., § 15-6-109, as added by 1971, ch. 111, § 1, p. 233.]

#### JUDICIAL DECISIONS

**Cited in:** *Greene v. Cooke*, 96 Idaho 48, 524 P.2d 176 (1973).

**15-6-110. Financial institution protection — Payment of P.O.D. account.** — Any P.O.D. account may be paid, on request, to any original party to the account. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee. [I.C., § 15-6-110, as added by 1971, ch. 111, § 1, p. 233.]

**15-6-111. Financial institution protection — Payment of trust account.** — Any trust account may be paid, on request, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as trustee or beneficiary. Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees. [I.C., § 15-6-111, as added by 1971, ch. 111, § 1, p. 233.]

**15-6-112. Financial institution protection — Discharge.** — Payment made pursuant to sections 15-6-108, 15-6-109, 15-6-110 or 15-6-111 of this Part discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors. The protection here given does not extend to payments made after a financial institution has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected under this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here. The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts. [I.C., § 15-6-112, as added by 1971, ch. 111, § 1, p. 233.]

#### JUDICIAL DECISIONS

**Pledge of Account.**

Ordinarily, where a person borrows money from a savings institution in which that person is party to an account and pledges the deposits in that account as security for that loan, the pledge is effective as a payment of

that account and the financial institution is discharged from all claims for amounts so paid so long as the loan remains unpaid. *Smith v. Idaho State Univ. Fed. Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982).

**15-6-113. Financial institution protection — Setoff.** — Without qualifying any other statutory right to setoff or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to setoff against the account in which the party has or had immediately before his death a present right of withdrawal. The amount of the account subject to setoff is that proportion to which the debtor is, or was immediately before his death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal. [I.C., § 15-6-113, as added by 1971, ch. 111, § 1, p. 233.]

#### PART 2. PROVISIONS RELATING TO EFFECT OF DEATH

**15-6-201. Provisions for payment or transfer at death.** — (a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance, agreement to pass property at death to the surviving spouse or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision:

- (1) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the

decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand; or

(3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under other laws of this state.

(c) In the case of agreements to pass property at death to the surviving spouse, such agreements shall be executed in writing, acknowledged or proved in the same manner as deeds to real property, contain a description of all real property, be altered or amended in the same way, and shall be revoked in the event husband and wife are subsequently divorced. The existence of such an agreement shall not affect the rights of creditors and any debt, cause of action or any obligation which could have been presented as a claim against the property of the decedent's estate shall survive against the other parties to the agreement; statutes of limitations on any such debts, causes of action, choses in action, or other legal obligations shall continue to run as though the deceased person had survived and any action brought against the persons succeeding to such property shall be brought within the period limited for the commencement of such action, provided that recovery against the person succeeding to such property shall be limited to the fair market value of the property at the time of the death of the decedent.

(d) No such agreement shall be effective to pass title to property until it has been recorded, prior to the death of any party thereto, in the recorder's office of the county of the domicile of the decedent and of each county in which real property described therein is located; nor shall any amendment to any such agreement be effective for any purpose until such amendment has been recorded in like manner prior to the death of any party thereto. [I.C., § 15-6-201, as added by 1971, ch. 111, § 1, p. 233; am. 1973, ch. 167, § 18, p. 319.]

### STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

### RESEARCH REFERENCES

**A.L.R.** — “Pour-over” provisions from will to inter vivos trust. 12 A.L.R.3d 56.

### COMMENT TO OFFICIAL TEXT

This section authorizes a variety of contractual arrangements which have in the past been treated as testamentary. For example

most courts treat as testamentary a provision in a promissory note that if the payee dies before payment is made the note shall be paid



to another named person, or a provision in a land contract that if the seller dies before payment is completed the balance shall be cancelled and the property shall belong to the vendee. These provisions often occur in family arrangements. The result of holding the provisions testamentary is usually to invalidate them because not executed in accordance with the statute of wills. On the other hand the same courts have for years upheld beneficiary designations in life insurance contracts. Similar kinds of problems are arising in regard to beneficiary designations in pension funds and under annuity contracts. The analogy of the power of appointment provides some historical base for solving some of these problems aside from a validating statute. However, there appear to be no policy reasons for continuing to treat these varied arrangements as testamentary. The revocable living trust and the multiple-party bank accounts, as well as the experience with United States government bonds payable on death to named ben-

eficiaries, have demonstrated that the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize. The fact that these provisions often are part of a business transaction and in any event are evidenced by a writing eliminate the danger of "fraud."

Because the types of provisions described in the statute are characterized as nontestamentary, the instrument does not have to be executed in compliance with Section 2-502; nor does it have to be probated, nor does the personal representative have any power or duty with respect to the assets involved.

The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section. It does not invalidate other arrangements by negative implication. Thus it is not intended by this section to embrace oral trusts to hold property at death for named persons; such arrangements are already generally enforceable under trust law.

### PART 3. UNIFORM TOD SECURITY REGISTRATION ACT

#### **15-6-301. Definitions.** — In this part:

(1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) "Register," including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(3) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(4) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.

(5) "Security account" means: (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, cash equivalents, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death; (ii) an investment management or custody account with a trust company or a trust division of a bank with trust powers, including the securities in the account, a cash balance in the account, cash, cash equivalents, interest, earnings, or dividends earned or declared on a security in the account, whether or not credited to the account before the owner's death; or (iii) a cash balance or other property held for or due to the owner of a security as

a replacement for or product of an account security, whether or not credited to the account before the owner's death. [I.C., § 15-6-301, as added by 1996, ch. 303, § 1, p. 996; am. 2002, ch. 122, § 1, p. 345.]

#### OFFICIAL COMMENT

"Security" is defined as provided in UCC § 8-102 and includes shares of mutual funds and other investment companies. The defined term "security account" is not intended to include securities held in the name of a bank or similar institution as nominee for the benefit of a trust.

"Survive" is not defined. No effort is made in this Act to define survival as it is for purposes of intestate succession in UPC § 2-104 which requires survival by an heir of the ancestor for 120 hours. For purposes of this Act, survive is used in its common law sense of

outliving another for any time interval no matter how brief. The drafting committee sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of "survive" in joint tenancy registrations.

The definitions of "devisee," "heirs," "person," "personal representative," "property," and "state" are taken from Section 1-201 of the Uniform Probate Code which, as revised in 1989, includes this Act as Part 3 of Article VI.

**15-6-302. Registration in beneficiary form — Sole or joint tenancy ownership.** — Only individuals whose registration of a security shows sole ownership by one (1) individual or multiple ownership by two (2) or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common. [I.C., § 15-6-302, as added by 1996, ch. 303, § 1, p. 996.]

#### OFFICIAL COMMENT

This section is designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of all co-owners. It coerces co-owning registrants to signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the entireties (T ENT), or as owners of community property. Also, it imposes survivorship on co-owners holding in a beneficiary form that fails to specify a survivorship form of holding. Tenancy in common and community property otherwise than in a survivorship setting is negated for registration in beneficiary form because persons desiring to signal independent death beneficiaries for each individual's fractional interest in a co-owned security normally will split their holding into separate registrations of

the number of units previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary.

The term "individuals," as used in this section, limits those who may register as owner or co-owner of a security in beneficiary form to natural persons. However, the section does not restrict individuals using this ownership form as to their choice of death beneficiary. The definition of "beneficiary form" in Section 1 indicates that any "person" may be designated beneficiary in a registration in beneficiary form. "Person" is defined so that a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary.

**15-6-303. Registration in beneficiary form — Applicable law.** — A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the

time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law. [I.C., § 15-6-303, as added by 1996, ch. 303, § 1, p. 996.]

#### COMMENT TO OFFICIAL TEXT

This section encourages registrations in beneficiary form to be made whenever a state with which either of the parties to a registration has contact has enacted this or a similar statute. Thus, a registration in beneficiary form of X Company shares might rely on an enactment of this Act in X Company's state of incorporation, or in the state of incorporation of X Company's transfer agent. Or, an enactment by the state of the issuer's principal

office, the transfer agent's principal office, or of the issuer's office making the registration also would validate the registration. An enactment of the state of the registering owner's address at time of registration also might be used for validation purposes.

The last sentence of this section is designed to establish a statutory presumption that a general principle of law is available to achieve a result like that made possible by this Act.

**15-6-304. Origination of registration in beneficiary form.** — A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners in the form set forth in section 15-6-305, Idaho Code. [I.C., § 15-6-304, as added by 1996, ch. 303, § 1, p. 996; am. 2000, ch. 244, § 1, p. 680.]

#### OFFICIAL COMMENT

As noted above in commentary to Section 2, this Act places no restriction on who may be

designated beneficiary in a registration in beneficiary form.

**15-6-305. Form of registration in beneficiary form.** — Registration in beneficiary form shall be shown by the words "transfer on death" or the abbreviation "TOD," or by the words "pay on death" or the abbreviation "POD," after the name of the registered owner and before the name of a beneficiary. [I.C., § 15-6-305, as added by 1996, ch. 303, § 1, p. 996; am. 2000, ch. 244, § 2, p. 680.]

#### OFFICIAL COMMENT

The abbreviation POD is included for use without regard for whether the subject is a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to securities evidenced by conventional title documentation. The use of POD in a registration in beneficiary form of shares in an investment company should not be taken as a signal that the investment is to be sold or redeemed on the owner's death so that the

sums realized may be "paid" to the death beneficiary. Rather, only a transfer on death, not a liquidation on death, is indicated. The committee would have used only the abbreviation TOD except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation POD as signalling a valid nonprobate death benefit or transfer on death.

**15-6-306. Effect of registration in beneficiary form.** — The designation of a TOD beneficiary on a registration in beneficiary form has no



effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary. [I.C., § 15-6-306, as added by 1996, ch. 303, § 1, p. 996.]

#### OFFICIAL COMMENT

This section simply affirms the right of a sole owner, or the right of all multiple owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity's terms and conditions, if

any, may be relevant. See Section 10. If the terms and conditions have nothing on the point, cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.

**15-6-307. Ownership on death of owner.** — On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners. [I.C., § 15-6-307, as added by 1996, ch. 303, § 1, p. 996.]

#### OFFICIAL COMMENT

Even though multiple owners holding in the beneficiary form here authorized hold with right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who become entitled to securities by reason of having survived the sole owner of the last to die of multiple owners. Issuers (and registering entities) who decide to accept registrations in beneficiary form involving more than one primary beneficiary also should provide by rule whether fractional shares will be registered in the names of surviving beneficiaries where the number of shares held by the deceased owner does not divide without remnant among the survivors. If fractional shares are not desired, the issuer may wish to provide for sale of odd shares and division of proceeds, for an uneven distribution with the first or last named to receive the odd share, or for other resolution. Section 8 deals with whether intermediaries have any obligation to offer beneficiary registrations of any sort; Section 10 enables issuers to adopt terms and conditions controlling the details of applications for registrations they decide to accept and procedures for implementing such registrations after an owner's death.

The reference to surviving, multiple TOD beneficiaries as tenants in common is not intended to suggest that a registration form specifying unequal shares, such as "TOD A (20%), B (30%), C (50%)" would be improper. Though not included in the beneficiary forms described for illustrative purposes in Section 10, the Act enables a registering entity to accept and implement a TOD beneficiary designation like the one just suggested. If offered, such a registration form should be implemented by registering entity terms and conditions providing for disposition of the share of a beneficiary who predeceases the owner when two or more of a group of multiple beneficiaries survive the owner. For example, the terms might direct the share of the predeceased beneficiary to the survivors in the proportion that their original shares bore to each other. Unless unequal shares are specified in a registration in beneficiary form designating multiple beneficiaries, the shares of the beneficiaries would, of course, be equal.

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any

anti-lapse statute that might direct a nonprobate transfer on death to the surviving issue of a beneficiary who failed to survive the owner. Rather, the statement is intended only to indicate that the registering entity involved should transfer or reregister the secu-

rity as directed by the decedent's personal representative.

See the Comment to Section 1 regarding the meaning of "survive" for purposes of this Act.

**15-6-308. Protection of registering entity.** — (1) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this part.

(2) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this part.

(3) A registering entity is discharged from all claims to a security by the estate, creditors, heirs or devisees of a deceased owner if it registers a transfer of the security in accordance with section 15-6-307, Idaho Code, and does so in good faith reliance (i) on the registration, (ii) on this part, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this part.

(4) The protection provided by this part to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds. [I.C., § 15-6-308, as added by 1996, ch. 303, § 1, p. 996.]

#### OFFICIAL COMMENT

It is to be noted that the "request" for a registration in beneficiary form may be in any form chosen by a registering entity. The Act does not prescribe a particular form and does not impose record-keeping requirements. Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.

The written notice referred to in subsection (c) [(3)] would qualify as a notice under UCC § 8-403.

"Good faith" as used in this section is intended to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," as specified in UCC § 2-103(1)(b).

The protections described in this section are designed to meet any questions regarding registering entity protection that may not be

foreclosed by issuer protections provided in the Uniform Commercial Code. Because persons interested in this Act may wish to be reminded of relevant UCC provisions, a brief summary follows.

"U.C.C. § 8-403, 'Issuer's Duty as to Adverse Claims' contains detailed provisions regarding duties of inquiry by an issuer of a certificated or uncertificated security who is requested to effect a transfer, and the availability and use of 30 day notices to force adverse claimants to start litigation if further delay in transfer is desired. U.C.C. § 8-201's definition of 'issuer' for purposes of 'registration of transfer ...' is simply 'a person on whose behalf transfer books are maintained'. U.C.C. § 8-403 is among the sections dealing with registration of transfers.

"U.C.C. sections 8-308 and 8-404(1) appear



to exonerate an issuer who acts in response to transfer directions signalled by the 'necessary indorsement' on or with a certificated security or in response to 'an instruction originated by an appropriate person' in the case of an uncertificated security. Section 8-308 describes the meaning of 'appropriate person' in the case of a certificated security as 'the person specified by the certificated security ... to be entitled to the security.' U.C.C. § 8-308(6) (1978). In the case of an uncertificated security, 'appropriate person' means the 'registered owner.' *Id.* § 8-308(7). The survivor of owners listed as joint tenants with right of survivorship is specifically defined as an authorized person. *Id.* § 8-308(8)(d). The U.C.C. aspect of the problem could be met by an additional sub-paragraph to section 8-308(8) that would include a TOD beneficiary as an 'appropriate person' when the beneficiary has survived the owner.

"No U.C.C. addition would be necessary if a TOD beneficiary designation were viewed as a contingent order for transfer at the owner's death that may be safely implemented as a direction from the owner as an 'authorized person.' The owner's death before completion of the transfer would not pose U.C.C. prob-

lems because section 8-308(10) provides: 'Whether the person signing is appropriate is determined as of the date of signing and an indorsement made by or an instruction originated by him does not become unauthorized for the purposes of this Article by virtue of any subsequent change of circumstances.'

"It might be questioned whether a TOD direction, which may be revoked before it is carried into effect and is also contingent on the beneficiary's survival of the registrant, is within the transfer directions contemplated by the U.C.C. framers for purposes of issuer protection. However, since section 8-202 explicitly protects issuers against problems arising because of restrictions or conditions on transfers, only the novelty of revocable directions for transfer on death gives pause.

"In general, article 8 of the U.C.C. reflects a careful attempt to protect implementation of a wide range of transfer instructions so long as the signatures are genuine and are those of owners acting in conformity with duly imposed rules of the issuer organisation. ... Hence, existing U.C.C. protections should be adequate, ..."

Wellman, *Transfer-On-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789, 823 n.90 (1987).

**15-6-309. Nontestamentary transfer on death.** — (1) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this part and is not testamentary.

(2) This part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state. [I.C., § 15-6-309, as added by 1996, ch. 303, § 1, p. 996.]

#### OFFICIAL COMMENT

Subsection (a) is comparable to UPC § 6-214 [not adopted in Idaho]. Subsection (b) is similar to UPC § 6-101(b) [not adopted in Idaho].

Consideration should be given to the desir-

ability of adapting the section as necessary to fit local principles regarding the rights of a surviving spouse to protection against disinheritance by nonprobate transfers effective at death.

**15-6-310. Terms, conditions and forms for registration.** — (1) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may



be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one (1) or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(2) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(a) Sole owner-sole beneficiary: John S. Brown, TOD (or POD) John S. Brown Jr.

(b) Multiple owners-sole beneficiary: John S. Brown, Mary B. Brown, JT TEN TOD John S. Brown Jr.

(c) Multiple owners-primary and secondary (substituted) beneficiaries: John S. Brown, Mary B. Brown, JT TEN TOD John S. Brown Jr., SUB BENE Peter Q. Brown or John S. Brown, Mary B. Brown, JT TEN TOD John S. Brown Jr., LDPS. [I.C., § 15-6-310, as added by 1996, ch. 303, § 1, p. 996.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

#### OFFICIAL COMMENT

Use of "and" or "or" between the names of persons registered as co-owners is unnecessary under the Act and should be discouraged. If used, the two words should have the same meaning insofar as concerns a title form; *i.e.*, that of "and" to indicate that both named persons own the asset.

Descendants of a named beneficiary who

take by virtue of a "LDPS" designation appended to a beneficiary's name take as TOD beneficiaries rather than as intestate successors. If no descendant of a predeceased primary beneficiary survives the owner, the security passes as a part of the owner's estate as provided in Section 7.

**15-6-311. Short title — Rules of construction.** — (1) This part shall be known as and may be cited as the "Uniform TOD Security Registration Act."

(2) This act shall be liberally construed and applied to promote its underlying purposes and policy and to make uniform the laws with respect to the subject of this act among states enacting it.

(3) Unless displaced by the particular provisions of this act, the principles of law and equity supplement its provisions. [I.C., § 15-6-311, as added by 1996, ch. 303, § 1, p. 996.]

STATUTORY NOTES

**Compiler's Notes.** — The words “this act” refer to S.L. 1996, ch. 303, which is compiled as §§ 15-6-301 to 15-6-312.

**15-6-312. Application of part.** — This part applies to registrations of securities in beneficiary form made before or after the effective date [July 1, 1996] of this act, by decedents dying on or after the effective date of this act. [I.C., § 15-6-312, as added by 1996, ch. 303, § 1, p. 996.]

PART 4. COMMUNITY PROPERTY RIGHT OF SURVIVORSHIP

**15-6-401. Community property with right of survivorship in real property.** — Any estate in real property held by a husband and wife as community property with right of survivorship shall, upon the death of one (1) spouse, transfer and belong to the surviving spouse. An estate in community property with right of survivorship is created by a grant, transfer or devise to a husband and wife, when expressly declared in the grant, transfer or devise to be an estate in community property with right of survivorship. An estate in community property with right of survivorship may also be created by grant or transfer from a husband and wife, when holding title as community property or otherwise, to themselves or from either husband or wife to both husband and wife when expressly declared in the grant, transfer or devise to be an estate in community property with right of survivorship. [I.C., § 15-6-401, as added by 2008, ch. 175, § 1, p. 478.]

**15-6-402. Termination of community property with right of survivorship in real property.** — (1) In the case of real property owned by a husband and wife as community property with right of survivorship pursuant to section 15-6-401, Idaho Code, the right of survivorship is extinguished on the recordation in the office of the recorder of the county or counties where the real property is located an affidavit entitled “affidavit terminating right of survivorship” executed by either spouse under oath which sets forth:

- (a) A stated intent by the spouse to terminate the survivorship right;
  - (b) A description in the instrument by which the right of survivorship was created, including the date the instrument was recorded and the county recorder's book and page or instrument reference number; and
  - (c) The legal description of the real property affected by the affidavit.
- The recordation shall not extinguish the community interest of either spouse.

(2) Divorce, or annulment of the marriage of, the husband and wife, unless otherwise ordered by the court in which the divorce is granted, severs the interests of the former spouses in property held by them at the time of the divorce or annulment as community property with the right of survivorship and transforms the interests of the former spouses into tenancies in common. A severance under this section does not affect any

third party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed or recorded in records appropriate to the kind and location of the property that a person relied upon as evidence of ownership in the ordinary course of transactions involving that property. [I.C., § 15-6-402, as added by 2008, ch. 175, § 1, p. 478.]

## CHAPTER 7

### TRUST ADMINISTRATION

#### PART 1. TRUST REGISTRATION

##### SECTION.

- 15-7-101. Duty to register trusts.
- 15-7-102. Registration procedures.
- 15-7-103. Effect of registration.
- 15-7-104. Effect of failure to register.
- 15-7-105. Registration — Qualification of foreign trustee.

#### PART 2. JURISDICTION OF COURT CONCERNING TRUSTS

- 15-7-201. Court — Exclusive jurisdiction of trusts.
- 15-7-202. Trust proceedings — Venue.
- 15-7-203. Trust proceedings — Dismissal of matters relating to foreign trusts.
- 15-7-204. Court — Concurrent jurisdiction of litigation involving trusts and third parties.
- 15-7-205. Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.
- 15-7-206. Trust proceedings — Initiation by notice — Necessary parties.

#### PART 3. DUTIES AND LIABILITIES OF TRUSTEES

- 15-7-301. General duties not limited.
- 15-7-302. Trustee's standard of care and performance.

##### SECTION.

- 15-7-303. Duty to inform and account to beneficiaries.
- 15-7-304. Duty to provide bond.
- 15-7-305. Trustee's duties — Appropriate place of administration — Deviation.
- 15-7-306. Personal liability of trustee to third parties.
- 15-7-307. Limitations on proceedings against trustees after final account.
- 15-7-308. Removal of trustee.

#### PART 4. POWERS OF TRUSTEES

- 15-7-401. Powers of trustees.
- 15-7-402. Additional powers.
- 15-7-403. Appointment of trustee and letters of trusteeship.

#### PART 5. TRUST PROTECTOR

- 15-7-501. Trust protector.
- 15-7-502. Spendthrift trusts.

#### PART 6. PURPOSE TRUSTS

- 15-7-601. Purpose trusts.

#### PART 7. DRY TRUSTS

- 15-7-701. Dry trusts.

### PART 1. TRUST REGISTRATION

**15-7-101. Duty to register trusts.** — The trustee of a trust having its principal place of administration in this state shall register the trust in the court of this state at the principal place of administration. Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but one (1) corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one (1) such person and no corporate



co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them. The duty to register under this Part does not apply to the trustee of a trust if registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release. [I.C., § 15-7-101, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Cross References.** — Charitable trusts, provisions required to qualify for federal tax exemptions, § 68-1201 et seq.

### JUDICIAL DECISIONS

#### Principal Place of Administration.

Where the record did not disclose if or where trust of Idaho bank stock and farm property was registered, decedent's will appointed defendant bank located in Salt Lake City, Utah as trustee and decedent's widow traveled to Salt Lake City to discuss the trust,

it is clear that the principal place of administration under this section was Utah; thus, pursuant to § 15-7-203, the Idaho court had proper subject matter jurisdiction under § 15-7-201. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

### COMMENT TO OFFICIAL TEXT

#### [General comment to §§ 15-7-101 — 15-7-307.]

Several considerations explain the presence in the Uniform Probate Code of procedures applicable to inter vivos and testamentary trusts. The most important is that the Court assumed by the Code is a full power court which appropriately may receive jurisdiction over trustees. Another is that personal representatives under Articles III and IV [Chapters 3 and 4] and conservators under Article V [Chapter 5], have the status of trustees. It follows naturally that these fiduciaries and regular trustees should bear a similar relationship to the Court. Also, the general move of the Code away from the concept of supervisory jurisdiction over any fiduciary is compatible with the kinds of procedural provisions which are believed to be desirable for trustees.

The relevance of trust procedures to those relating to settlement of decedents' estates is apparent in many situations. Many trusts are created by will. In a substantial number of states, statutes now extend probate court control over decedents' estates to testamentary trustees, but the same procedures rarely apply to inter vivos trusts. For example, eleven states appear to require testamentary trustees to qualify and account in much the same manner as executors, though quite different requirements relate to trustees of inter vivos trusts in these same states. Twenty-four states impose some form of mandatory court accountings on testamentary trustees, while

only three seem to have comparable requirements for inter vivos trustees.

From an estate planning viewpoint, probate court supervision of testamentary trustees causes many problems. In some states, testamentary trusts cannot be released to be administered in another state. This requires complicated planning if inconvenience to interested persons is to be avoided when the beneficiaries move elsewhere. Also, some states preclude foreign trust companies from serving as trustees of local testamentary trusts without complying with onerous or prohibitive qualification requirements. Regular accountings in court have proved to be more expensive than useful in relation to the vast majority of trusts and sometimes have led to the ill-advised use of legal life estates to avoid these burdens.

The various restrictions applicable to testamentary trusts have caused many planners to recommend use of revocable inter vivos trusts. The widely adopted Uniform Testamentary Addition to Trusts Act has accelerated this tendency by permitting testators to devise estates to trustees of previously established receptacle trusts which have and retain the characteristics of inter vivos trusts for purpose of procedural requirements.

The popularity of this legislation and the widespread use of pour-over wills indicates rather vividly the obsolescence and irrelevance of statutes contemplating supervisory jurisdiction.

One of the problems with inter vivos and

receptacle trusts at the present time, however, is that persons interested in these arrangements as trustees or beneficiaries frequently discover that there are no simple and efficient statutory or judicial remedies available to them to meet the special needs of the trust relationship. Proceedings in equity before courts of general jurisdiction are possible, of course, but the difficulties of obtaining jurisdiction over all interested persons on each occasion when a judicial order may be necessary or desirable are commonly formidable. A few states offer simplified procedures on a voluntary basis for inter vivos as well as testamentary trusts. In some of these, however, the legislation forces inter vivos trusts into unpopular patterns involving supervisory control. Nevertheless, it remains true of the legislation in most states that there is too little for inter vivos trusts and too much for trusts created by will.

Other developments suggest that enactment of useful, uniform legislation on trust procedures is a matter of considerable social importance. For one thing, accelerating mobility of persons and estates is steadily increasing the pressure on locally oriented property institutions. The drafting and technical problems created by lack of uniformity of trust procedures in the several states are quite serious. If people cannot obtain efficient trust service to preserve and direct wealth because of state property rules, they will turn in time to national arrangements that eliminate property law problems. A general shift away from local management of trusted wealth and increased reliance on various contractual claims against national funds seems the most likely consequence if the local law of trusts remains nonuniform and provincial.

Modestly endowed persons who are turning to inter vivos trusts to avoid probate are of more immediate concern. Lawyers in all parts of the country are aware of the trend toward reliance on revocable trusts as total substitutes for wills which recent controversies about probate procedures have stimulated. There would be little need for concern about this development if it could be assumed also that the people involved are seeking and getting competent advice and fiduciary assistance. But there are indications that many people are neither seeking nor receiving adequate information about trusts they are using. Moreover, professional fiduciaries are often not available as trustees for small estates. Consequently, neither settlors nor trustees of "do-it-yourself" trusts have much idea of what they are getting into. As a result, there are corresponding dangers to beneficiaries who are frequently uninformed or baffled by formidable difficulties in obtaining relief or information.

Enactment of clear statutory procedures

creating simple remedies for persons involved in trust problems will not prevent disappointment for many of these persons but should help minimize their losses.

Several objectives of the Code are suggested by the preceding discussion. They may be summarized as follows:

1. To eliminate procedural distinctions between testamentary and inter vivos trusts.
2. To strengthen the ability of owners to select trustees by eliminating formal qualification of trustees and restrictions on the place of administration.
3. To locate nonmandatory judicial proceedings for trustees and beneficiaries in a convenient court fully competent to handle all problems that may arise.
4. To facilitate judicial proceedings concerning trusts by comprehensive provisions for obtaining jurisdiction over interested persons by notice.
5. To protect beneficiaries by having trustees file written statements of acceptance of trusts with suitable courts, thereby acknowledging jurisdiction and providing some evidence of the trust's existence for future beneficiaries.
6. To eliminate routinely required court accountings, substituting clear remedies and statutory duties to inform beneficiaries.

**[General comment to §§ 15-7-101 — 15-7-105.]**

Registration of trusts is a new concept and differs importantly from common arrangements for retained supervisory jurisdiction of courts of probate over testamentary trusts. It applies alike to inter vivos and testamentary trusts, and is available to foreign-created trusts as well as those locally created. The place of registration is related not to the place where the trust was created, which may lose its significance to the parties concerned, but is related to the place where the trust is primarily administered, which in turn is required (Section 7-305) to be at a location appropriate to the purposes of the trust and the interests of its beneficiaries. Sections 7-102 and 7-305 provide for transfer of registration. The procedure is more flexible than the typical retained jurisdiction in that it permits registration or submission to other appropriate procedures at another place, even in another state, in order to accommodate relocation of the trust at a place which becomes more convenient for its administration. (Cf. 20 Pa. Stat. § 2080.309.) In addition, the registration acknowledges that a particular court will be accessible to the parties on a permissive basis without subjecting the trust to compulsory, continuing supervision by the court.

The process of registration requires no judicial action or determination but is accomplished routinely by simple acts on the part of



the trustee which will place certain information on file with the court (Section 7-102). Although proceedings involving a registered trust will not be continuous but will be separate each time an interested party initiates a proceeding, it is contemplated that a court will maintain a single file for each registered trust as a record available to interested persons. Proceedings are facilitated by the broad jurisdiction of the court (Section 7-201) and the Code's representation and notice provisions (Section 1-403).

Section 7-201 provides complete jurisdiction over trust proceedings in the court of registration. Section 7-103 above provides for jurisdiction over parties. Section 7-104 should facilitate use of trusts involving assets in several states by providing for a single principal place of administration and reducing concern about qualification of foreign trust companies.

**[Comment to § 15-7-101.]**

This section rests on the assumption that a central "filing office" will be designated in each county where the Court may sit in more than one place.

The scope of this section and of Article VII [Chapter 7] is tied to the definition of "trustee" in section 1-201. It was suggested that the definition should be expanded to include "land trusts." It was concluded, however, that the inclusion of this term, which has special meaning principally in Illinois, should be left for decision by enacting states. Under the definition of "trust" in this Code, custodial arrangements as contemplated by legislation dealing with gifts to minors, are excluded, as are "trust accounts" as defined in Article VI [Chapter 6].

**15-7-102. Registration procedures.** — Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere. The statement shall identify the trust: (1) in the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate; (2) in the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument; or (3) in the case of an oral trust, by information identifying the settlor or other source of funds and describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance. If a trust has been registered elsewhere, registration in this state is ineffective until the earlier registration is released by order of the court where prior registration occurred, or an instrument executed by the trustee and all beneficiaries, filed with the registration in this state. [I.C., § 15-7-102, as added by 1971, ch. 111, § 1, p. 233.]

**COMMENT TO OFFICIAL TEXT**

Additional duties of the clerk of the Court are provided in Section 1-305. The duty to register trusts is stated in Section 7-101.

**15-7-103. Effect of registration.** — (a) By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the court in any proceeding under [section] 15-7-201 of this code relating to the trust that may be initiated by any interested person while the trust remains registered. Notice of any proceeding shall be delivered to the trustee, or mailed to him by ordinary first class mail at his address as listed in the registration or as thereafter reported to the court and to his address as then known to the petitioner.

(b) To the extent of their interests in the trust, all beneficiaries of a trust properly registered in this state are subject to the jurisdiction of the court of



registration for the purposes of proceedings under section 15-7-201 of this code, provided notice is given pursuant to section 15-1-401 of this code. [I.C., § 15-7-103, as added by 1971, ch. 111, § 1, p. 233.]

### STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

The bracketed word “section” was inserted by the compiler to comply with the standard statutory citation style.

### JUDICIAL DECISIONS

**Cited in:** *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

### COMMENT TO OFFICIAL TEXT

This section provides for jurisdiction over the parties. Subject matter jurisdiction for proceedings involving trusts is described in Sections 7-201 and 7-202. The basic jurisdictional concept in Section 7-103 is that reflected in widely adopted long-arm statutes, that a state may properly entertain proceedings when it is a reasonable forum under all the circumstances, provided adequate notice is given. Clearly the trustee can be deemed to consent to jurisdiction by virtue of registration. This basis for consent jurisdiction is in addition to and not in lieu of other bases of jurisdiction during or after registration. Also, incident to an order releasing registration under Section 7-305, the Court could condition the release on registration of the trust in another state or court. It also seems reasonable to require beneficiaries to go to the seat

of the trust when litigation has been initiated there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by his selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered. Although most cases will fit within traditional concepts of jurisdiction, the section goes beyond established doctrines of in personam or quasi in rem jurisdiction as regards a nonresident beneficiary's interests in foreign land or chattels, but the National Conference believes the section affords due process and represents a worthwhile step forward in trust proceedings.

**15-7-104. Effect of failure to register.** — A trustee who fails to register a trust in a proper place as required by this Part, for purposes of any proceedings initiated by a beneficiary of the trust prior to registration, is subject to the personal jurisdiction of any court in which the trust could have been registered. In addition, any trustee who, within thirty (30) days after receipt of a written demand by a settlor or beneficiary of the trust, fails to register a trust as required by this chapter is subject to removal and denial of compensation or to surcharge as the court may direct unless directed not to register by all beneficiaries or as provided in section 15-1-108 of this code a person with a general power of appointment representing all the beneficiaries and acting for them. A provision in the terms of the trust purporting to excuse the trustee from the duty to register, or directing that the trust or trustee shall not be subject to the jurisdiction of the court, is ineffective. [I.C., § 15-7-104, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

COMMENT TO OFFICIAL TEXT

Under Section 1-108, the holder of a presently exercisable general power of appointment can control all duties of a fiduciary to beneficiaries who may be changed by exercise of the power. Hence, if the settlor of a revocable inter vivos trust directs the trustee to refrain from registering a trust, no liability would follow even though another beneficiary demanded registration. The ability of the general power holder to control the trustee ends when the power is terminated.

**15-7-105. Registration — Qualification of foreign trustee.** — A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state. A foreign cotrustee is not required to qualify in this state solely because its cotrustee maintains the principal place of administration in this state. Unless otherwise doing business in this state, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this state, or maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in this state. [I.C., § 15-7-105, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, §§ 207, 212.  
**C.J.S.** — 90 C.J.S., Trusts, § 284 et seq.

COMMENT TO OFFICIAL TEXT

Section 7-105 deals with nonresident trustees in a fashion which should correct a widespread deficiency in present regulation of trust activity. Provisions limiting business of foreign corporate trustees constitute an unnecessary limitation on the ability of a trustee to function away from its principal place of business. These restrictions properly relate more to continuous pursuit of general trust business by foreign corporations than to isolated instances of litigation and management of the assets of a particular trust. The ease of avoiding foreign corporation qualification statutes by the common use of local nominees or subtrustees, and the acceptance of these practices, are evidence of the futility and undesirability of more restrictive legislation of the sort commonly existing today. The position embodied in this section has been recommended by important segments of the banking and trust industry through a proposed model statute, and the failure to adopt this reform has been characterized as unfortunate by a leading trust authority. See 5 Scott on Trusts § 558 (3rd ed. 1967).

PART 2. JURISDICTION OF COURT CONCERNING TRUSTS

**15-7-201. Court — Exclusive jurisdiction of trusts.** — (a) The court of registration has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administra-

tion and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

- (1) appoint or remove a trustee;
- (2) review trustees' fees and to review and settle interim or final accounts;
- (3) ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and to determine the existence or nonexistence of any immunity, power, privilege, duty or right; and
- (4) release registration of a trust.

(b) Neither registration of a trust nor a proceeding under this section results in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the court as invoked by interested parties or as otherwise exercised as provided by law. [I.C., § 15-7-201, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

### ANALYSIS

Construction.

Subject matter jurisdiction.

#### Construction.

Both § 15-7-202 and § 15-7-203 clearly recognize that in the appropriate circumstances an Idaho district court may have subject matter jurisdiction even though it is not the court of registration; in order for these two sections to be read consistently with this section, the "exclusive" jurisdiction language of this section must be read to pertain only to those trusts with courts of registration in Idaho. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

if trust of Idaho bank stock and farm property was registered, decedent's will appointed defendant bank located in Salt Lake City, Utah as trustee and decedent's widow traveled to Salt Lake City to discuss the trust, it was clear that the principal place of administration under § 15-7-101 was Utah; thus, pursuant to § 15-7-203, the Idaho court had proper subject matter jurisdiction under this section. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

#### Subject Matter Jurisdiction.

Where the record did not disclose where or

## RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, § 300 et seq.

**C.J.S.** — 90 C.J.S., Trusts, § 347 et seq.

**A.L.R.** — "Pour-over" provisions from will to inter vivos trust. 12 A.L.R.3d 56.

Validity and effect of gift for charitable

purposes which excludes otherwise qualified beneficiaries because of their race or religion. 25 A.L.R.3d 736.

Eligibility of foreign corporation to appointment as executor, administrator, or testamentary trustee. 26 A.L.R.3d 1019.



Merger or consolidation of corporation as terminating charitable trust of which corporation is beneficiary. 34 A.L.R.3d 749.

Construction and application of "first refusal" option contained in trust instrument and relating to sale of shares of stock. 51 A.L.R.3d 1327.

Construction and operation of will or trust provision appointing advisors to trustee or executor. 56 A.L.R.3d 1249.

Court's power to appoint additional trustees over number specified in trust instrument. 59 A.L.R.3d 1129.

Validity and construction of trust instrument which fails to designate respective interests of beneficiaries. 87 A.L.R.3d 925.

Adopted child as within class named in deed or inter vivos trust instrument. 37 A.L.R.5th 237.

## COMMENT TO OFFICIAL TEXT

Derived in small part from Florida Statutes 1965, Chapters 737 and 87, and Title 20, Penna. Statutes, (Purdon) 32080.101 et seq.

**15-7-202. Trust proceedings — Venue.** — Venue for proceedings under section 15-7-201 of this Part involving registered trusts is in the place of registration. Venue for proceedings under section 15-7-201 of this Part involving trusts not registered in this state is in any place where the trust properly could have been registered, and otherwise by the rules of civil procedure. [I.C., § 15-7-202, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

### Construction.

Both this section and § 15-7-203 clearly recognize that in the appropriate circumstances an Idaho district court may have subject matter jurisdiction even though it is not the court of registration; in order for these

two sections to be read consistently with § 15-7-201, the "exclusive" jurisdiction language of § 15-7-201 must be read to pertain only to those trusts with courts of registration in Idaho. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

## RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, § 605.

**C.J.S.** — 90 C.J.S., Trusts, §§ 564, 565.

**15-7-203. Trust proceedings — Dismissal of matters relating to foreign trusts.** — The court will not, over the objection of a party, entertain proceedings under section 15-7-201 of this Part involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order. [I.C., § 15-7-203, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

### ANALYSIS

Construction.  
Failure to object.

**Construction.**

Both § 15-7-202 and this section clearly recognize that in the appropriate circumstances an Idaho district court may have subject matter jurisdiction even though it is not the court of registration; in order for these two sections to be read consistently with § 15-7-201, the “exclusive” jurisdiction language of § 15-7-201 must be read to pertain only to those trusts with courts of registration in Idaho. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

**Failure to Object.**

Where defendant Utah trust company did

not raise objection to proceeding in Idaho for breach of fiduciary duties, the district court properly entertained the action since under this section the *forum non conveniens* concept specifically requires a party to object before the court is required to review whether it will entertain a proceeding involving a trust registered or having its principal place of administration in another state. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

**COMMENT TO OFFICIAL TEXT**

While recognizing that trusts which are essentially foreign can be the subject of proceedings in this state, this section employs the concept of *forum non conveniens* to center litigation involving the trustee and beneficiaries at the principal place of administration of the trust but leaves open the possibility of suit elsewhere when necessary in the interests of justice. It is assumed that under this section a court would refuse to entertain litigation involving the foreign registered trust unless for jurisdictional or other reasons, such as the nature and location of the property or unusual interests of the parties, it is manifest that substantial injustice would result if the parties were referred to the court of registration. As regards litigation involving third parties, the trustee may sue and be sued as any owner and manager of property under the usually applicable rules of civil procedure

and also as provided in Section 7-203.

The concepts of *res judicata* and full faith and credit applicable to any managing owner of property have generally been applicable to trustees. Consequently, litigation by trustees has not involved the artificial problems historically found when personal representatives maintain litigation away from the state of their appointment, and a prior adjudication for or against a trustee rendered in a foreign court having jurisdiction is viewed as conclusive and entitled to full faith and credit. Because of this, provisions changing the law, analogous to those relating to personal representatives in Section 4-401 do not appear necessary. See also Section 3-408. In light of the foregoing, the issue is essentially only one of *forum non conveniens* in having litigation proceed in the most appropriate forum. This is the function of this section.

**15-7-204. Court — Concurrent jurisdiction of litigation involving trusts and third parties.** — The court of the place in which the trust is registered has concurrent jurisdiction with other courts of this state of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties. Venue is determined by the rules generally applicable to civil action. [I.C., § 15-7-204, as added by 1971, ch. 111, § 1, p. 233.]

**RESEARCH REFERENCES**

**A.L.R.** — Validity of inter vivos trust established by one spouse which impairs the other spouse's distributive share or other statutory rights in property. 39 A.L.R.3d 14.

Validity of trust created by instrument which names the same person, or persons, as trustees and beneficiaries. 2 A.L.R.4th 1219; 7 A.L.R.4th 621; 37 A.L.R. Fed. 95.

**15-7-205. Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.** — On petition of an interested person, after notice to all interested persons, the

court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, and the reasonableness of the compensation of any person so employed, and the reasonableness of the compensation determined by the trustee for his own services. Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds. [I.C., § 15-7-205, as added by 1971, ch. 111, § 1, p. 233.]

RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, §§ 347, 365, 420, 510.  
**C.J.S.** — 90 C.J.S., Trusts, §§ 344, 395 et seq., 606 et seq.  
**A.L.R.** — Limiting effect of provision in contract, will, or trust instrument fixing trustee's or executor's fees. 19 A.L.R.3d 520.  
Amount of attorneys' compensation in matters involving guardianship and trusts. 57 A.L.R.3d 550.

Amount of attorneys' compensation in proceedings involving wills and administration of decedents' estates. 58 A.L.R.3d 317.  
Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation. 96 A.L.R.3d 1102.

COMMENT TO OFFICIAL TEXT

In view of the broad jurisdiction conferred on the probate court, description of the special proceeding authorized by this section might be unnecessary. But the Code's theory that trustees may fix their own fees and those of their attorneys marks an important departure from much existing practice under which fees are determined by the Court in the first

instance. Hence, it seems wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy. This review would meet in part the criticism of the broad powers given in the Uniform Trustees' Powers Act.

**15-7-206. Trust proceedings — Initiation by notice — Necessary parties.** — Proceedings under section 15-7-201 of this Part are initiated by filing a petition in the court and giving notice pursuant to section 15-1-401 of this code to interested parties. The court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified. [I.C., § 15-7-206, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

PART 3. DUTIES AND LIABILITIES OF TRUSTEES

**15-7-301. General duties not limited.** — Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this code. [I.C., § 15-7-301, as added by 1971, ch. 111, § 1, p. 233.]



## · STATUTORY NOTES

**Cross References.** — Trustee's powers, §§ 68-104 — 68-113.

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as

adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

## RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, § 300 et seq.

**C.J.S.** — 90 C.J.S., Trusts, § 318 et seq.

**15-7-302. Trustee's standard of care and performance.** — Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills. [I.C., § 15-7-302, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

### ANALYSIS

Liabilities of conservator.

Liabilities of personal representative.

Sale of stock received in merger.

### Liabilities of Conservator.

Under the Uniform Probate Code, the duties and liabilities of a conservator are much the same as those of a trustee. *Brixey v. Hoffman*, 101 Idaho 215, 611 P.2d 1000 (1979).

A coconservator was not absolutely liable for another conservator's conversion of insurance proceeds; rather, he was liable for that loss only if he breached his fiduciary duties and that breach had some causal connection with the loss. *Brixey v. Hoffman*, 101 Idaho 215, 611 P.2d 1000 (1979).

### Liabilities of Personal Representative.

Where the personal representative's failure to safeguard the property of the estate resulted in the liquidation of an asset and payment to another of the cash proceeds, which rightfully belonged to the estate, and where the enrichment through any interest which could have been accrued from the time of the sale to the time of reimbursement should be to the estate, not to those who stood to profit from the representative's mismanagement of the estate, it was proper for the

magistrate to order the personal representative to pay interest at the statutory rate on the proceeds of the sale of real estate. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

### Sale of Stock Received in Merger.

Where executor, after decedent's death but prior to delivery of estate assets to plaintiff decedent's widow, exchanged 100 shares of bank stock for 2,540 shares of another bank's stock in merger transaction and then transferred all 2,540 shares to defendant trustee, it was not a breach of trustee's standard of care and performance under this section for trustee to sell 1,540 shares without plaintiff's consent or court approval since defendant trustee never received any shares of the original bank stock, the sale of which was restricted by decedent's will, and the stock received in the merger exchange was not the equivalent of the original bank stock. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

**Cited in:** *Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005).

## COMMENT TO OFFICIAL TEXT

This is a new general provision designed to make clear the standard of skill expected

from trustees both individual and corporate, nonprofessional and professional. It differs

somewhat from the standard stated in § 174 of the Restatement of Trusts, Second, which is as follows:

“The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a reasonable man of ordinary prudence, he is under a duty to exercise such skill.”

**15-7-303. Duty to inform and account to beneficiaries.** — The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

(a) Within thirty (30) days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one (1) or more persons who under section 15-1-403 of this code may represent beneficiaries with future interests, of the court in which the trust is registered and of his name and address.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee. [I.C., § 15-7-303, as added by 1971, ch. 111, § 1, p. 233.]

STATUTORY NOTES

**Compiler’s Notes.** — \*The words “this code” refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, § 371 et seq.

**C.J.S.** — 90 C.J.S., Trusts, § 587 et seq.

**A.L.R.** — Duty of personal representative of deceased trustee to render account. 36 A.L.R.3d 1071.

COMMENT TO OFFICIAL TEXT

Analogous provisions are found in Section 3-705.

This provision does not require regular accounting to the Court nor are copies of statements furnished beneficiaries required to be filed with the Court. The parties are expected to assume the usual ownership responsibility for their interests including their own record keeping. Under Section 1-108, the holder of a general power of appointment or of revocation can negate the trustee’s duties to any other person.

This section requires that a reasonable se-

lection of beneficiaries is entitled to information so that the interests of the future beneficiaries may adequately be protected. After mandatory notification of registration by the trustee to the beneficiaries, further information may be obtained by the beneficiary upon request. This is to avoid extensive mandatory formal accounts and yet provide the beneficiary with adequate protection and sources of information. In most instances, the trustee will provide beneficiaries with copies of annual tax returns or tax statements that must be filed. Usually this will be accompanied by a

narrative explanation by the trustee. In the case of the charitable trust, notice need be given only to the attorney general or other state officer supervising charitable trusts and in the event that the charitable trust has, as its primary beneficiary, a charitable corpora-

tion or institution, notice should be given to that charitable corporation or institution. It is not contemplated that all of the individuals who may receive some benefit as a result of a charitable trust be informed.

**15-7-304. Duty to provide bond.** — A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the court of registration or other appropriate court in amounts and with sureties and liabilities as provided in sections 15-3-604 and 15-3-606 of this code relating to bonds of personal representatives. [I.C., § 15-7-304, as added by 1971, ch. 111, § 1, p. 233.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and gener-

ally compiled in chapters 1 through 7 of this title.

#### RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, § 397 et seq.

**C.J.S.** — 90 C.J.S., Trusts, § 302.

#### COMMENT TO OFFICIAL TEXT

See Sections 3-603 and 3-604; 60 Okla. Stats. 1961, § 175.24 [60 Okl. St. Ann. § 175.24]; Pa.Fid.Act, 1949, § 390.911 (b) [20

Pardon's Pa. Stat. § 390.911(b)]; cf. Tenn. Code Ann. § 35-113.

**15-7-305. Trustee's duties — Appropriate place of administration — Deviation.** — A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state. Trust provisions relating to the place of administration and to changes in the place of administration or of trustee control unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration. [I.C., § 15-7-305, as added by 1971, ch. 111, § 1, p. 233.]



## RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, § 300 et seq.

## COMMENT TO OFFICIAL TEXT

This section and 7-102 are related. The latter section makes it clear that registration may be released without Court order if the trustee and beneficiaries can agree on the matter. Section 1-108 may be relevant, also.

The primary thrust of Article VII [Chapter 7] is to relate trust administration to the jurisdiction of courts, rather than to deal with substantive matters of trust law. An aspect of deviation, however, is touched here.

**15-7-306. Personal liability of trustee to third parties. —**

(a) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(b) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(c) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding. [I.C., § 15-7-306, as added by 1971, ch. 111, § 1, p. 233.]

## JUDICIAL DECISIONS

## ANALYSIS

Construction.

Exercise of contractual obligation in own name.

Liability to trustee.

**Construction.**

The statutory modification of the common law rule by this section does not alter the trustee's status as the holder of title to assets in the trust estate, nor does it make it necessary for the trustee to disclose his fiduciary capacity in executing documents that affect the trust estate; by implication this section recognizes that a trustee may effectively enter into contracts for trust purposes without disclosure of his fiduciary capacity. *Dennett v. Kuenzli*, 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997).

**Exercise of Contractual Obligation in Own Name.**

Plaintiff's exercise of option in contract that provided for seller of land to have option to

repurchase land under certain conditions, in his own name, was effective even if the option was held by him subject to his fiduciary obligation as trustee. *Dennett v. Kuenzli*, 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997).

**Liability to Trustee.**

Where the personal representative mismanaged the property of the estate causing the trustee to accrue fees which were beyond those associated with the usual and ordinary duties of a trustee, the personal representative, as a fiduciary, is liable to the interested parties, such as the trustee, for the extraordinary costs incurred by the trustee. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

## RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, §§ 366 et seq., 409, 410, 437, 438.

**C.J.S.** — 90 C.J.S., Trusts, § 321 et seq.

## COMMENT TO OFFICIAL TEXT

The purpose of this section is to make the liability of the trust and trustee the same as that of the decedent's estate and personal representative.

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes of determining the

claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

**15-7-307. Limitations on proceedings against trustees after final account.** — Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within six (6) months after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination is protected after three (3) years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in subsections (a)(1) and (2) [subsections (a) and (b)] of section 15-1-403 of this code. [I.C., § 15-7-307, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The bracketed reference "subsections (a) and (b)" near the end of the section was inserted by the compiler to reflect the designation scheme in § 15-1-403.

The words "this code" refer to the Uniform Probate Code, as adopted by S.L. 1971, ch. 111, § 1 and generally compiled in chapters 1 through 7 of this title.

## JUDICIAL DECISIONS

**Breach of Voting Trust.**

Action for breach of voting trust arising from the dilution of the beneficiary's ownership interest in the bank as a result of the employee stock option plan accrued when the dilution occurred; therefore, where the dilu-

tion occurred six years before the action was filed, the claim was barred under both § 5-224 and this section. *First Bank & Trust v. Jones*, 111 Idaho 481, 725 P.2d 186 (Ct. App. 1986).

## RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, § 655 et seq.

**C.J.S.** — 90 C.J.S., Trusts, §§ 566 et seq., 720 et seq., 770 et seq.

## COMMENT TO OFFICIAL TEXT

Final accounts terminating the trustee's obligations to the trust beneficiaries may be formal or informal. Formal judicial accountings may be initiated by the petition of any trustee or beneficiary. Informal accounts may be conclusive by consent or by limitation. This section provides a special limitation supporting informal accounts. With regard to facilitating distribution see Section 5-103.

Section 1-108 makes approval of an informal account or settlement with a trustee by the holder of a presently exercisable general power of appointment binding on all beneficiaries. In addition, the equitable principles of estoppel and laches, as well as general statutes of limitation, will apply in many cases to terminate trust liabilities.

**15-7-308. Removal of trustee.** — (1) A trustee may be removed in accordance with the terms of the trust or by the court on its own initiative or on petition of a trustor, cotrustee or beneficiary.

(2) The court may remove a trustee or order other appropriate relief:

- (a) If the trustee has committed a material breach of trust;
- (b) If the trustee is unfit or unable to administer the trust;
- (c) If lack of cooperation among cotrustees substantially impairs the administration of the trust;
- (d) If the investment decisions of the trustee, although not constituting a breach of trust, have resulted in investment performance persistently and substantially below those of comparable trusts;
- (e) If, because of changed circumstances, removal of the trustee would substantially further the trustor's purpose in creating the trust; or
- (f) For other good cause shown.

(3) Pending a final decision on the petition to remove the trustee, the court may order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries. [I.C., § 15-7-308, as added by 2000, ch. 157, § 1, p. 399.]

## PART 4. POWERS OF TRUSTEES

**15-7-401. Powers of trustees.** — The powers of trustees are set forth in the uniform powers of trustees act [uniform trustees' powers act], sections 68-104 through 68-113, Idaho Code. [I.C., § 15-7-401, as added by 1971, ch. 111, § 1, p. 233.]

## STATUTORY NOTES

**Compiler's Notes.** — The bracketed insertion was added by the compiler to correct the name of the referenced act.

**15-7-402. Additional powers.** — In addition to the powers provided for in section 15-7-401, Idaho Code, a trustee shall have the following powers:



(1) To sever any trust estate on a fractional share basis into two (2) or more separate trusts for any reason.

(2) To divide a trust into two (2) or more single trusts or consolidate two (2) or more trusts into a single trust, upon those terms and conditions as it considers appropriate, provided that the trustee make a written determination that: (a) division or consolidation is not inconsistent with the intent of the trustor with regard to any trust to be consolidated or divided; (b) division or consolidation would facilitate administration of the trusts; and (c) division or consolidation would be in the best interests of all beneficiaries and not materially impair their respective interests. The trustee shall give written notice of the proposed division or consolidation by personal service or by certified mail to all interested persons of every trust affected by the division or consolidation and to any trustee of such trust(s) who does not join in the notice. The notice shall: (i) state the name and mailing address of the trustee; (ii) include a copy of the governing instrument of each trust to be divided or consolidated; (iii) include a statement of assets and liabilities of each trust to be divided or consolidated, dated within ninety (90) days of the notice; (iv) fully describe the terms and manner of division or consolidation; and (v) state the reasons supporting the proposed division or consolidation. The notice shall advise the recipient of the right to petition for a judicial determination of the proposed division or consolidation as provided in subsection (3) of this section. The notice shall include a form on which consent or objection to the proposed division or consolidation may be indicated. If the trustee receives written consent to the proposed division or consolidation from all persons entitled to notice, the trustee may divide or consolidate the trusts as provided in the notice. Any person dealing with the trustee of the resulting divided or consolidated trust is entitled to rely on the authority of that trustee to act and is not obliged to inquire into the validity or propriety of the division or consolidation under this section.

(3) Any interested person may petition the court of the county in which the principal place of administration of a trust is located for an order dividing one (1) or more trusts or consolidating two (2) or more trusts. If nonjudicial consolidation has been commenced pursuant to subsection (2) of this section, a petition may be filed under this section unless the trustee has received all necessary consents. The principal place of administration of the trust is the trustee's usual place of business where the records pertaining to the trust are kept, or the trustee's residence if the trustee has no such place of business. At the conclusion of the hearing, if the court finds that the requirements of subsections (2)(a), (b) and (c) of this section have been satisfied, it may direct division of one (1) or more trusts or consolidation of two (2) or more trusts on such terms and conditions as appropriate. The court, in its discretion, may provide for payment from one (1) or more of the trusts of reasonable fees and expenses for any party to the proceeding.

(4) If the net fair market value of the assets of a trust, taken collectively, is less than one hundred thousand dollars (\$100,000), the trustee may terminate the trust by the following procedure:

(a) The trustee shall determine a plan for distribution that agrees, as nearly as possible, with the trust's dispositive plan;

(b) The trustee shall give notice, in writing, to all interested persons of its intent to distribute the assets in accordance with the plan unless an interested person objects in writing within thirty (30) days after the date of the notice, containing also in such notice a statement of the provisions of paragraph (e) of this subsection;

(c) If no written objection is received by the trustee within thirty (30) days after the date of the written notice to all interested persons, the trustee shall proceed to distribute the trust assets in accordance with the plan;

(d) If the trustee receives a written objection to the plan within thirty (30) days after the date of the notice, the trustee shall not distribute the assets of the trust, but may then petition the court for an order authorizing distribution in accordance with the plan, and the court shall have plenary authority to approve, modify, or reject the trustee's petition;

(e) For purposes of the thirty (30) day provisions of this subsection, the "date of notice" shall be the later of the date set forth in the notice (if any) or the date of actual mailing, if mailed, or of actual delivery, if delivered in person to the interested person, and provided further that an objection in writing is timely if mailed within thirty (30) days to the trustee, with the burden of proof of the date of such mailing to be on the interested person.

The existence of a spendthrift or similar provision shall not affect the trustee's powers under this subsection unless the trust instrument specifically provides that the trustee shall not have the power to terminate the trust.

(5) This section applies to all trusts whenever created. [I.C., § 15-7-402, as added by 1995, ch. 180, § 1, p. 663; am. 1997, ch. 211, § 1, p. 629; am. 2006, ch. 162, § 1, p. 482.]

STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 162, substituted "one hundred thousand dollars (\$100,000)" for "twenty-five thousand dollars (\$25,000)" in the introductory paragraph of subsection (4).

**15-7-403. Appointment of trustee and letters of trusteeship. —** Upon application to the court in which the trust is registered in the state of Idaho, and notice to all interested parties, the court may appoint the trustee as such (or as successor trustee, if applicable). Upon filing of an acceptance of the duties of the office of trustee by the trustee, containing the oath of the trustee to the effect that the trustee will perform the duties of his office according to the law, letters of trusteeship shall be issued, evidencing the authority of the trustee. Such letters may be recorded in the office of the county recorder in any county in which property held by the trust is located and, from the time of filing of such letters for record, notice is imparted to all persons of the contents of such letters of trusteeship. The application to the court shall contain at least the following:

(1) A statement of the interest of the applicant in the matter, including the priority of the person whose appointment is sought and a statement of the names and addresses and priority for appointment of any other persons

having a prior or equal right to the appointment under law or the terms of the trust;

(2) A description of the trust;

(3) A statement identifying and indicating the address of any existing trustee of the trust whose appointment has not been terminated;

(4) The name and address of the person or entity for whom appointment is sought;

(5) A statement identifying and indicating the address of all current and contingent beneficiaries of the trust, and the ages of any such beneficiaries that are minors;

(6) A statement that a copy of the trust is either in the possession of the court or accompanies the application, or that copies of portions of the trust accompany the application showing:

(a) The grantor and original trustee of the trust,

(b) Any language regarding the appointment of an original or successor trustee, including any limitations thereon,

(c) The signature page(s) of the trust,

(d) Any amendments to the trust which relate to the appointment of an original or successor trustee, including any limitations thereon;

(7) A statement that, after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the trust;

(8) If the application is for appointment of a successor trustee, a statement of the method of termination of the appointment of the prior trustee and the effective date thereof and that copies of any documents relating thereto are in the possession of the court or accompany the application. [I.C., § 15-7-403, as added by 1998, ch. 80, § 1, p. 285; am. 2004, ch. 55, § 3, p. 253.]

## STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

## PART 5. TRUST PROTECTOR

### **15-7-501. Trust protector.** — (1) Definition of terms:

(a) "Distribution trust advisor" means a person given authority by the trust instrument to exercise all or any portions of the powers and discretions set forth in subsection (11) of this section.

(b) "Excluded fiduciary" means any fiduciary excluded from exercising certain powers under the instrument, which powers may be exercised by the grantor or a trust advisor or a trust protector.

(c) "Fiduciary" means a trustee under any testamentary or other trust, an executor, administrator, or personal representative of a decedent's estate, or any other party, including a trust advisor or a trust protector, who is acting in a fiduciary capacity for any person, trust or estate.

(d) "Instrument" means any revocable or irrevocable trust document whether created inter vivos or testamentary.



(e) "Investment trust advisor" means a person given authority by the trust instrument to exercise all or any portions of the powers and discretions set forth in subsection (10) of this section.

(f) "Trust advisor" means a distribution trust advisor or an investment advisor.

(g) "Trust protector" means any disinterested third party whose appointment is provided for in the trust instrument.

(2) Liability limits of excluded fiduciary. An excluded fiduciary is not liable, either individually or as a fiduciary, for either of the following:

(a) Any loss that results from compliance with a direction of the trust advisor;

(b) Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization.

Any excluded fiduciary is also relieved from any obligation to perform investment reviews and make recommendations with respect to any investments to the extent the trust advisor had authority to direct the acquisition, disposition or retention of any such investment.

(3) Death of grantor. An excluded fiduciary may continue to follow the direction of the trust advisor upon the incapacity or death of the grantor if the instrument so allows.

(4) When trust advisor considered as fiduciary. If one (1) or more trust advisors are given authority by the terms of a governing instrument to direct, consent to, or disapprove a fiduciary's investment decisions, or proposed investment decisions, such trust advisors shall be considered to be fiduciaries when exercising such authority unless the governing instrument provides otherwise.

(5) Excluded fiduciary's liability for loss if trust protector appointed. If an instrument appoints a trust protector, the excluded fiduciary is not liable for any loss resulting from any action taken upon such trust protector's direction.

(6) Powers and discretions of trust protector. The powers and discretions of a trust protector shall be as provided in the governing instrument and may, in the best interests of the trust, be exercised or not exercised in the sole and absolute discretion of the trust protector and shall be binding on all other persons. Such powers and discretion may include the following:

(a) To modify or amend the trust instrument to achieve favorable tax status or because of changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;

(b) To increase or decrease the interests of any beneficiaries to the trust;

(c) To modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;

(d) To terminate the trust;

(e) To veto or direct trust distributions;

(f) To change situs or governing law of the trust, or both;

- (g) To appoint a successor trust protector;
- (h) To interpret terms of the trust instrument at the request of the trustee;
- (i) To advise the trustee on matters concerning a beneficiary; and
- (j) To amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust.

(7) Submission to court jurisdiction — Effect on trust advisor or trust protector. By accepting an appointment to serve as a trust advisor or trust protector of a trust that is subject to the laws of this state, the trust advisor or the trust protector submits to the jurisdiction of the courts of Idaho even if investment advisory agreements or other related agreements provide otherwise, and the trust advisor or trust protector may be made a party to any action or proceeding if issues relate to a decision or action of the trust advisor or trust protector.

(8) Powers of trust protector incorporated by reference in will or trust instrument. Any of the powers enumerated in subsection (6) of this section, as they exist at the time of the signing of a will by a testator or testatrix or at the time of the signing of a trust instrument by a trustor may be, by appropriate reference made thereto, incorporated in whole or in part in such will or trust instrument by a clearly expressed intention of a testator or testatrix of a will or trustor of a trust instrument.

(9) Investment trust advisor or distribution trust advisor provided for in trust instrument. A trust instrument governed by the laws of Idaho may provide for a person to act as an investment trust advisor or a distribution trust advisor, respectively, with regard to investment decisions or discretionary distributions.

(10) Powers and discretions of investment trust advisor. The powers and discretions of an investment trust advisor shall be provided in the trust instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the investment trust advisor and are binding on any other person and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document provide otherwise, the investment trust advisor has the power to perform the following:

- (a) Direct the trustee with respect to the retention, purchase, sale or encumbrance of trust property and the investment and reinvestment of principal and income of the trust;
- (b) Vote proxies for securities held in trust; and
- (c) Select one (1) or more investment advisors, managers or counselors, including the trustee, and delegate to them any of its powers.

(11) Powers and discretions of distribution trust advisor. The powers and discretions of a distribution trust advisor shall be provided in the trust instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the distribution trust advisor and are binding on any other person and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document provide otherwise, the distribution trust advisor shall direct the trustee with regard

to all discretionary distributions to beneficiaries. [I.C., § 15-7-501, as added by 1999, ch. 331, § 1, p. 893; am. 2007, ch. 68, § 2, p. 174.]

### STATUTORY NOTES

**Amendments.** — The 2007 amendment, by ch. 68, added subsections (1)(a) and (1)(f) and made related redesignations; rewrote subsection (1)(e) (formerly (1)(d)), which read: “Trust advisor’ means the grantor of an instrument, or other fiduciaries, in which any power, including the power and authority to direct the acquisition, disposition, or retention of any investment, or the power to autho-

rize any act that an excluded fiduciary may propose, is reserved to the exclusion of another fiduciary also acting under the instrument. “Trust advisor’ also includes any party accepting the delegation of a fiduciary’s power to direct the acquisition, disposition or retention of any investment”; and added subsections (6)(d) through (6)(j) and (8) through (11).

**15-7-502. Spendthrift trusts.** — (1) A settlor may provide in the terms of the trust that the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.

(2) A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a “spendthrift trust” is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted under this section.

(3) Validity of a restraint on transfer in a trust document shall not require specific reference to or identical verbiage set forth in subsection (1) or (2) of this section.

(4) If a person is both a settlor and beneficiary of the same trust, a provision restraining the voluntary or involuntary transfer of the settlor’s beneficial interest in such trust does not prevent the settlor’s creditors from satisfying claims from the settlor’s interest in the trust estate that relates to the portion of the trust that was contributed by the settlor. For the purposes of this subsection (4), however, a settlor shall not be considered to be a beneficiary of an irrevocable trust created by the settlor and taxed for federal income tax purposes pursuant to the grantor trust rules of the Internal Revenue Code, sections 671 through 679, inclusive, if the settlor’s only beneficial interest in such trust consists of the right to receive a distribution from such trust in an amount equal to or less than the amount of the federal and state income tax liability incurred by the settlor as a result of such trust being characterized as a grantor trust pursuant to the aforementioned grantor trust rules.

(5) A beneficiary of a trust shall not be considered a settlor of a trust merely because of a lapse, waiver or release of:

(a) A power described in subsection (6) of this section; or

(b) The beneficiary’s right to withdraw a part of the trust property to the extent that the value of the property affected by the lapse, waiver or release in any calendar year does not exceed the greater of the amount specified in:

(i) Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, as amended; or

(ii) Section 2503(b) of the Internal Revenue Code of 1986, as amended.



(6) A beneficiary of a trust shall not be considered a settlor, to have made a voluntary or involuntary transfer of the beneficiary's interest in a trust, or to have the power to make a voluntary or involuntary transfer of the beneficiary's interest in the trust, merely because the beneficiary, in any capacity including, but not limited to, as a trustee, holds or exercises:

(a) A presently exercisable power to:

(i) Consume, invade, appropriate or distribute property to or for the benefit of the beneficiary, if the power is either exercisable only on consent of another person holding an interest adverse to the beneficiary's interest or limited by an ascertainable standing including, but not limited to, health, education, support or maintenance of the beneficiary; or

(ii) Exercise a limited power of appointment, as defined in the Internal Revenue Code of 1986, as amended, including, but not limited to, the power to appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary's estate, or a creditor of the beneficiary's estate;

(b) A testamentary power of appointment; or

(c) A presently exercisable right described in subsection (5)(b) of this section. [I.C., § 15-7-502, as added by 2007, ch. 68, § 4, p. 174.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 15-7-502, which comprised I.C., § 15-5-508, as added by 1995, ch. 179, § 1, p. 662; am. and redesi. 2000, ch. 178, § 1, p. 447, was repealed by S.L. 2007, ch. 68, § 3.

**Federal References.** — Sections 671 through 679 of the Internal Revenue Code, referred to in subsection (4), are codified as 26

U.S.C.S. §§ 671 to 679.

Sections 2041 and 2514 of the Internal Revenue Code, referred to in paragraph (5)(b)(i), are codified as 26 U.S.C.S. §§ 2041 and 2514.

Section 2503 of the Internal Revenue Code, referred to in paragraph (5)(b)(ii), is codified as 26 U.S.C.S. § 2503.

#### PART 6. PURPOSE TRUSTS

**15-7-601. Purpose trusts.** — (1) A trust may be created for any purpose, charitable or noncharitable, under the terms of a trust agreement or will. A noncharitable trust so created is a purpose trust and shall exist to serve a purpose.

(2) A purpose trust does not need a beneficiary.

(3) A purpose trust shall be enforceable on the terms set forth in the trust agreement by the person named to enforce the trust; provided however, that the failure to name a person to enforce the trust shall not void the trust or otherwise cause it to be unenforceable.

(4) A person named to enforce a purpose trust may resign or be removed or replaced in accordance with the trust.

(5) If the person named to enforce the trust resigns, or is removed, or is unwilling or unable to act, and if no successor is named in accordance with the trust, the trustee shall forthwith apply to the court having jurisdiction of the purpose trust for directions or for a person to be appointed by the court to enforce the trust. The court having jurisdiction of the purpose trust shall be empowered to make an order appointing a person to enforce the

trust on such terms as it sees fit and to designate how successors will be named.

(6) During any period of time when no person is named or acting to enforce a purpose trust, the court having jurisdiction of the purpose trust shall have the right to exercise all powers necessary to enforce the trust in order to serve the purpose for which it was created.

(7) Any interested person, as defined in section 15-1-201(24) [(25)], Idaho Code, may bring an action under law or equity to enforce a purpose trust.

(8) Charitable trusts are not governed by this section.

(9) A purpose trust created prior to July 1, 2005, shall be valid and enforceable from the date of the trust's creation. [I.C., § 15-7-601, as added by 2005, ch. 99, § 1, p. 319.]

STATUTORY NOTES

**Compiler's Notes.** — The bracketed insertion in subsection (7) was added by the compiler to correct the statutory reference.

PART 7. DRY TRUSTS

**15-7-701. Dry trusts.** — A trust shall be valid and enforceable even though it may not be funded at a given time, or from time to time, or does not have any res or corpus or otherwise contain any asset of any nature. [I.C., § 15-7-701, as added by 2006, ch. 161, § 2, p. 481.]

CHAPTER 8

TRUST AND ESTATE DISPUTE RESOLUTION ACT

PART 1. PURPOSE, POWERS OF COURTS AND DEFINITIONS	SECTION.
	15-8-205. Application of doctrine of virtual representation.
	15-8-206. Special notice.
	15-8-207. Waiver of notice.
	15-8-208. Cost — Attorney's fees.
	15-8-209. Appointment of a guardian ad litem.
	15-8-210. Trial by jury.
	15-8-211. Execution on judgments.
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PART 2. JUDICIAL RESOLUTION	PART 3. NONJUDICIAL RESOLUTION
15-8-201. Persons entitled to judicial proceedings for declaration of rights or legal relations.	15-8-301. Purpose.
15-8-202. Judicial proceedings.	15-8-302. Binding agreement.
15-8-203. Procedural rules.	15-8-303. Entry of agreement with court — Effect.
15-8-204. Notice in judicial proceedings under this chapter requiring notice.	15-8-304. Judicial approval of agreement.
	15-8-305. Special representative.

PART 1. PURPOSE, POWERS OF COURTS AND DEFINITIONS

**15-8-101. Title — Purpose.** — (1) This chapter shall be known and may be cited as either the “Trust and Estate Dispute Resolution Act” or “TEDRA.”

(2) The overall purpose of this chapter is to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter under title 15, Idaho Code. The provisions of this chapter are intended to provide nonjudicial methods for the resolution of matters by agreement. This chapter also provides for judicial resolution of disputes if a nonjudicial resolution is not obtained that are alternatives to the other provisions for resolution of contested matters under other chapters of title 15, Idaho Code. The provisions of this chapter shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in title 15, Idaho Code, or other Idaho law. [I.C., § 15-8-101, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-102. General powers of courts — Intent — Plenary power of the court.** — (1) It is the intent of the legislature that the courts shall have full and ample power and authority under this chapter to administer and settle:

- (a) All matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney, in accordance with this chapter; and
- (b) All trusts and trust matters.

(2) If this title 15, Idaho Code, should in any case or under any circumstances be inapplicable, insufficient or doubtful with reference to the administration and settlement of matters listed in subsection (1) of this section, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court. [I.C., § 15-8-102, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-103. Definitions.** — The definitions in this section apply throughout this chapter unless the context clearly requires otherwise:

(1) “Matter” includes any issue, question or dispute involving:

- (a) The determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death;
- (b) The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity;
- (c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to:
  - (i) The construction of wills, trusts, devolution agreements, and other writings;
  - (ii) A change of personal representative or trustee;
  - (iii) A change of the situs of a trust;
  - (iv) An accounting from a personal representative or trustee; or
  - (v) The determination of fees for a personal representative or trustee;



(d) The grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law;

(e) The amendment, reformation, or conformation of a will or a trust instrument to comply with statutes and regulations of the United States internal revenue service in order to more efficiently allocate exemptions or to achieve qualification for deductions, elections, and other tax requirements including, but not limited to, the qualification of any gift thereunder for the benefit of a surviving spouse who is not a citizen of the United States for the estate tax marital deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the Internal Revenue Code, the qualification of any gift thereunder as a qualified conservation easement as permitted by federal law, or the qualification of any gift for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust; and

(f) With respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, including actual joint tenancy property, property subject to a devolution agreement, or assets subject to a pay on death or transfer on death designation:

(i) The ascertaining of any class of creditors or others for purposes of section 15-6-107, Idaho Code;

(ii) The ordering of a custodian of any of the decedent's records relating to a nonprobate asset to do or abstain from doing any particular act with respect to those records;

(iii) The determination of any question arising in the administration of a nonprobate asset under section 15-6-107, Idaho Code;

(iv) The determination of any questions relating to the abatement, rights of creditors, or other matter relating to the administration, settlement, or final disposition of a nonprobate asset under title 15, Idaho Code; and

(v) The resolution of any matter referencing this chapter, including a determination of any questions relating to the ownership or distribution of an individual retirement account on the death of the spouse of the account holder as contemplated by section 11-604A(6), Idaho Code;

(g) The resolution of any other matter that could affect the nonprobate asset.

(2) "Nonprobate assets" means assets that are covered by chapter 6, title 15, Idaho Code.

(3) "Party" or "parties" means each of the following persons who has an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner:

(a) The trustor if living;

(b) The trustee;

(c) The personal representative;

(d) An heir;

(e) A beneficiary, including devisees, legatees, and trust beneficiaries;

- (f) The surviving spouse of a decedent with respect to his or her interest in the decedent's property;
- (g) A guardian ad litem;
- (h) A creditor;
- (i) Any other person who has an interest in the subject of the particular proceeding;
- (j) The attorney general if required under section 67-1401(5), Idaho Code;
- (k) Any duly appointed and acting legal representative of a party such as a guardian, conservator, special representative, or attorney in fact;
- (l) Where applicable, the virtual representative of any person described in this subsection (3), the giving of notice to whom would meet notice requirements as provided in section 15-8-204, Idaho Code; and
- (m) The owner or the personal representative of the estate of the deceased owner of the nonprobate asset that is the subject of the particular proceeding, if the subject of the particular proceeding relates to the beneficiary's liability to a decedent's estate or creditors under section 15-6-107, Idaho Code.

(4) "Persons interested in the estate or trust" means the trustor, if living, all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of any charitable trust where the attorney general would be a necessary party to judicial proceedings concerning the trust, and any personal representative or trustee of the estate or trust.

(5) "Representative" and other similar terms refer to a person who virtually represents another person under section 15-8-205, Idaho Code.

(6) "Trustee" means any acting and qualified trustee of the trust. [I.C., § 15-8-103, as added by 2005, ch. 122, § 1, p. 397; am. 2007, ch. 341, § 1, p. 1000.]

#### STATUTORY NOTES

**Amendments.** — The 2007 amendment, by ch. 341, updated the section reference in subsection (3)(j).

the Internal Revenue Code, referred to in paragraph (1)(e), is codified as 26 U.S.C.S. § 2056A.

**Federal References.** — Section 2056A of

#### PART 2. JUDICIAL RESOLUTION

**15-8-201. Persons entitled to judicial proceedings for declaration of rights or legal relations.** — (1) Any party may have a judicial proceeding for the declaration of rights or legal relations with respect to:

- (a) Any matter, as defined in section 15-8-103, Idaho Code;
- (b) The resolution of any other case or controversy that arises under the Idaho Code and referenced judicial proceedings under this chapter; or
- (c) The determination of the persons entitled to notice under section 15-8-204, Idaho Code.

(2) The provisions of this chapter apply to disputes arising in connection with estates of incapacitated persons unless otherwise covered by chapter 5, title 15, Idaho Code. The provisions of this chapter shall not supersede, but shall supplement, any otherwise applicable provisions and procedures

contained in title 15, Idaho Code, or other Idaho law. The provisions of this chapter shall not apply to actions for wrongful death under any other chapter or title of Idaho Code. [I.C., § 15-8-201, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-202. Judicial proceedings.** — (1) The provisions of this chapter shall control over any inconsistent provision of the Idaho rules of civil procedure.

(2) A judicial proceeding under this chapter may be commenced as a new action or as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset.

(3) Once commenced, the action may be consolidated with an existing proceeding or converted to a separate action upon the motion of a party for good cause shown, or by the court on its own motion.

(4) The Idaho rules of civil procedure apply to judicial proceedings under this chapter only to the extent that they are consistent with this chapter, unless otherwise provided by Idaho Code, or ordered by the court under section 15-8-102, Idaho Code, or provided by other applicable Idaho rules of civil procedure. [I.C., § 15-8-202, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-203. Procedural rules.** — The Idaho rules of civil procedure apply to all proceedings under part 2 of this chapter. [I.C., § 15-8-203, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-204. Notice in judicial proceedings under this chapter requiring notice.** — (1) Subject to section 15-8-207, Idaho Code, in all judicial proceedings under this chapter that require notice, the notice must be personally served on or mailed to all parties or the parties' virtual representatives at least fourteen (14) days before the hearing on the petition, unless a different period is provided by statute or ordered by the court. The date of service shall be determined under the Idaho rules of civil procedure.

(2) Proof of the service or mailing required in this section must be made by affidavit or declaration filed at or before the hearing. [I.C., § 15-8-204, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-205. Application of doctrine of virtual representation.** — (1) This section is intended to adopt the common law concept of virtual representation. This section supplements the common law relating to the doctrine of virtual representation and the provisions of section 15-1-403, Idaho Code, and shall not be construed as limiting the application of that common law doctrine or the provisions of section 15-1-403, Idaho Code.

(2) Any notice requirement in this chapter is satisfied if notice is given as follows:

(a) Where an interest in an estate, trust, or nonprobate asset, or an interest that may be affected by a power of attorney, has been given to persons who comprise a certain class upon the happening of a certain event, notice may be given to the living persons who would constitute the



class if the event had happened immediately before the commencement of the proceedings requiring notice, and the persons shall virtually represent all other members of the class;

(b) Where an interest in an estate, trust, or nonprobate asset, or an interest that may be affected by a power of attorney, has been given to a living person, and the same interest, or a share in it, is to pass to the surviving spouse or to persons who are, or might be, the distributees, heirs, issue, or other kindred of that living person upon the happening of a future event, notice may be given to that living person, and the living person shall virtually represent the surviving spouse, distributees, heirs, issue, or other kindred of the person; and

(c) Except as otherwise provided in this subsection (2), where an interest in an estate, trust, or nonprobate asset, or an interest that may be affected by a power of attorney, has been given to a person or a class of persons, or both, upon the happening of any future event, and the same interest or a share of the interest is to pass to another person or class of persons, or both, upon the happening of an additional future event, notice may be given to the living person or persons who would take the interest upon the happening of the first event, and the living person or persons shall virtually represent the persons and classes of persons who might take upon the happening of the additional future event.

(3) A party is not virtually represented by a person receiving notice if a conflict of interest involving the matter is known to exist between the notified person and the party.

(4) An action taken by the court is conclusive and binding upon each person receiving actual or constructive notice or who is otherwise virtually represented. [I.C., § 15-8-205, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-206. Special notice.** — Nothing in this chapter eliminates the requirement to give notice to a person who has filed a demand for notice pursuant to section 15-3-204, Idaho Code. [I.C., § 15-8-206, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-207. Waiver of notice.** — Notwithstanding any other provision of this chapter, notice of a hearing does not need to be given to a legally competent person who has waived in writing notice of the hearing in person or by attorney, or who has appeared at the hearing without objecting to the lack of proper notice or personal jurisdiction. The waiver of notice may apply either to a specific hearing or to any and all hearings and proceedings to be held, in which event the waiver of notice is of continuing effect unless subsequently revoked by the filing of a written notice of revocation of the waiver and the mailing of a copy of the notice of revocation of the waiver to the other parties. Unless notice of a hearing is required to be given by publication, if all persons entitled to notice of the hearing waive the notice or appear at the hearing without objecting to the lack of proper notice or personal jurisdiction, the court may hear the matter immediately. A guardian or conservator or a guardian ad litem may make the waivers on behalf of the incapacitated person, and a trustee may make the waivers on behalf

of any competent or incapacitated beneficiary of the trust. A consul or other representative of a foreign government, whose appearance has been entered as provided by law on behalf of any person residing in a foreign country, may make the waiver of notice on behalf of the person. [I.C., § 15-8-207, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-208. Cost — Attorney’s fees.** — (1) Either the district court or the court on appeal may, in its discretion, order costs, including reasonable attorney’s fees, to be awarded to any party:

- (a) From any party to the proceedings;
- (b) From the assets of the estate or trust involved in the proceedings; or
- (c) From any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.

(2) This section applies to all proceedings governed by this chapter including, but not limited to, proceedings involving trusts, decedent’s estates and properties, and guardianship matters. Except as provided in section 12-117, Idaho Code, this section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, unless such statute specifically provides otherwise. [I.C., § 15-8-208, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-209. Appointment of a guardian ad litem.** — (1) The court, upon its own motion or upon request of one (1) or more of the parties, at any stage of a judicial proceeding or at any time in a nonjudicial resolution procedure, may appoint a guardian ad litem to represent the interests of a minor, or incapacitated, or unborn, or unascertained person, or any person whose identity or address is unknown, or a designated class of persons who are not ascertained or are not in being. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(2) The court appointed guardian ad litem supersedes the special representative if so provided in the court order.

(3) The court may appoint the guardian ad litem at an ex parte hearing, or the court may order a hearing as provided in section 15-8-201, Idaho Code, with notice as provided in this section and section 15-8-204, Idaho Code.

(4) The guardian ad litem is entitled to reasonable compensation for services. Such compensation is to be paid from the principal of the estate or trust whose beneficiaries are represented. [I.C., § 15-8-209, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-210. Trial by jury.** — If a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, shall settle and frame the issues to be tried. Any jury for any proceeding under this part 2 shall consist of six (6) jurors. If a jury is not demanded, the court shall try the issues, and sign and file its findings and decision in writing, as provided for in civil actions.



[I.C., § 15-8-210, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-211. Execution on judgments.** — Judgment on the issues, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions. [I.C., § 15-8-211, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-212. Appellate review.** — An interested party may seek appellate review of a final order, judgment, or decree of the court respecting a judicial proceeding under this chapter. The review must be done in the manner and way provided by law for appeals in civil actions. [I.C., § 15-8-212, as added by 2005, ch. 122, § 1, p. 397.]

### PART 3. NONJUDICIAL RESOLUTION

**15-8-301. Purpose.** — The purpose of this part 3 is to provide a binding nonjudicial procedure to resolve matters through written agreements among the parties interested in the estate or trust. The procedure is supplemental to, and may not derogate from, any other proceeding or provision authorized by statute or the common law. [I.C., § 15-8-301, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-302. Binding agreement.** — Sections 15-8-301 through 15-8-305, Idaho Code, shall be applicable to the resolution of any matter, as defined in section 15-8-103, Idaho Code, other than matters subject to chapter 5, title 15, Idaho Code, or a trust for a minor or other incapacitated person created at its inception by the judgment or decree of a court unless the judgment or decree provides that sections 15-8-301 through 15-8-305, Idaho Code, shall be applicable. If all parties agree to a resolution of any such matter, then the agreement shall be evidenced by a written agreement signed by all parties. Subject to the provisions of section 15-8-304, Idaho Code, the written agreement shall be binding and conclusive on all persons interested in the estate or trust. The agreement shall identify the subject matter of the dispute and the parties. If the agreement or a memorandum of the agreement is to be filed with the court under section 15-8-303, Idaho Code, the agreement may, but need not, include provisions specifically addressing jurisdiction, governing law, the waiver of notice of the filing and the discharge of any special representative who has acted with respect to the agreement. If a party who virtually represents another person under section 15-8-205, Idaho Code, signs the agreement, then the party's signature constitutes the signature of all persons whom the party virtually represents, and all the virtually represented persons shall be bound by the agreement. [I.C., § 15-8-302, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-303. Entry of agreement with court — Effect.** — (1) Any party, or a party's legal representative, may file the written agreement or a memorandum summarizing the written agreement with the court having jurisdiction over the estate or trust. However, if a special representative is



a party to the written agreement, the agreement or a memorandum of its terms may not be filed within thirty (30) days of the agreement's execution by all parties unless the written consent of the special representative is filed along with, or included within, the provision of such agreement or memorandum. The agreement or a memorandum of its terms may be filed after a special representative has commenced a proceeding under section 15-8-304, Idaho Code, only after the court has determined that the special representative has adequately represented and protected the parties represented. Failure to complete any action authorized or required under this subsection does not cause the written agreement to be ineffective and the agreement is nonetheless binding and conclusive on all persons interested in the estate or trust.

(2) On filing the agreement or memorandum, the agreement will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate or trust. [I.C., § 15-8-303, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-304. Judicial approval of agreement.** — Within thirty (30) days of execution of the agreement by all parties, the special representative may notice a hearing for presentation of the written agreement to a court of competent jurisdiction. The special representative shall provide notice of the time and date of the hearing to each party to the agreement whose address is known, unless such notice has been waived. Proof of mailing or delivery of the notice must be filed with the court. At such hearing, the court shall review the agreement on behalf of the parties represented by the special representative. The court shall determine whether or not the interests of the represented parties have been adequately represented and protected, and an order declaring the court's determination shall be entered. If the court determines that such interests have not been adequately represented and protected, the agreement shall be declared of no effect. [I.C., § 15-8-304, as added by 2005, ch. 122, § 1, p. 397.]

**15-8-305. Special representative.** — (1)(a) The personal representative or trustee may petition the court having jurisdiction over the matter for the appointment of a special representative to represent a person who is interested in the estate or trust and:

- (i) Who is a minor;
- (ii) Who is incompetent or disabled;
- (iii) Who is yet unborn or unascertained; or
- (iv) Whose identity or address is unknown.

The petition may be heard by the court without notice.

(b) In appointing the special representative, the court shall give due consideration and deference to any nomination(s) made in the petition, the special skills required in the representation, and the need for a representative who will act independently and prudently. The nomination of a person as special representative by the personal representative or trustee and the person's willingness to serve as special representative are not grounds by themselves for finding a lack of independence; provided

however, the court may consider any interests that the nominating fiduciary may have in the estate or trust in making the determination.

(c) The special representative may enter into a binding agreement on behalf of the person or beneficiary. The special representative may be appointed for more than one (1) person or class of persons if the interests of such persons or class are not in conflict. The petition shall be verified. The petition and order appointing the special representative may be in the following forms:

CAPTION OF CASE

PETITION FOR APPOINTMENT OF  
SPECIAL REPRESENTATIVE UNDER  
SECTION 15-8-305, IDAHO CODE

The undersigned petitioner petitions the court for the appointment of a special representative in accordance with section 15-8-305, Idaho Code, and represents to the court as follows:

1. Petitioner. Petitioner ..... is the qualified and presently acting (personal representative) (trustee) of the above (estate) (trust) having been named (personal representative) (trustee) under (describe will and reference probate order or describe trust instrument.)
2. Issue Concerning (Estate) (Trust) Administration. A question concerning administration of the (estate) (trust) has arisen as to (describe issue, for example, "Related to interpretation, construction, administration, distribution.") The issues are appropriate for determination under section 15-8-305, Idaho Code.
3. Beneficiaries. The beneficiaries of the (estate) (trust) include persons who are unborn, unknown, or unascertained persons, or who are under eighteen (18) years of age: (list, with status of each.)
4. Special Representative. The nominated special representative ..... is a lawyer licensed to practice before the courts of this state or an individual with special skills or training in the administration of estates or trusts. The nominated special representative does not have an interest in the affected estate or trust and is not related to any person interested in the estate or trust. The nominated special representative is willing to serve. The petitioner has no reason to believe that the nominated special representative will not act in an independent and prudent manner and in the best interests of the represented parties. (It is recommended that the petitioner also include information specifying the particular skills of the nominated special representative that relate to the matter in issue.)
5. Resolution. Petitioner desires to achieve a resolution of the questions that have arisen concerning the (estate) (trust). Petitioner believes that proceeding in accordance with the procedures permitted under sections 15-8-301 through 15-8-305, Idaho Code, would be in the best interests of the (estate) (trust) and the beneficiaries.
6. Request of Court. Petitioner requests that (....., an attorney licensed to practice in the state of Idaho,) (OR) (....., an individual

with special skills or training in the administration of estates or trusts,) be appointed special representative for those beneficiaries who are not yet adults, as well as for the unborn, unknown, and/or unascertained beneficiaries, as provided under section 15-8-305, Idaho Code.

DATED this ..... date of ....., .....

.....  
(Petitioner or Petitioner’s Legal Representative)

VERIFICATION

I certify under penalty of perjury under the laws of the state of Idaho that the foregoing is true and correct.

DATED ....., ....., at ....., Idaho.

.....  
(Petitioner or other person having knowledge)

CAPTION OF CASE

ORDER FOR APPOINTMENT OF  
SPECIAL REPRESENTATIVE UNDER  
SECTION 15-8-305, IDAHO CODE

THIS MATTER having come on for hearing before this Court on Petition for Appointment of Special Representative filed herein, and it appearing that it would be in the best interests of the (estate) (trust) described in the Petition to appoint a special representative to address the issues that have arisen concerning the (estate) (trust) and the Court finding that the facts stated in the Petition are true, now, therefore,

IT IS ORDERED that ..... is appointed under section 15-8-305, Idaho Code, as special representative for the (estate) (trust) beneficiaries who are not yet adult age, and for unborn, unknown, or unascertained beneficiaries to represent their respective interests in the (estate) (trust) as provided in section 15-8-305, Idaho Code. The special representative shall be discharged of responsibility with respect to the (estate) (trust) at such time as a written agreement is executed resolving the present issues, all as provided in that statute, or if an agreement is not reached within six (6) months from entry of this Order, the special representative appointed under this Order shall be discharged of responsibility, subject to subsequent reappointment under section 15-8-305, Idaho Code.

DONE IN OPEN COURT this ..... day of ....., .....

.....  
JUDGE

- (2) Upon appointment by the court, the special representative shall file a sworn certificate made upon penalty of perjury that he or she:
- (a) Is not interested in the estate or trust;
  - (b) Is not related to any person interested in the estate or trust;
  - (c) Is willing to serve; and
  - (d) Will act independently, prudently, and in the best interests of the represented parties.



(3) The special representative must be a lawyer licensed to practice before the courts of this state, or an individual with special skills or training in the administration of estates or trusts. The special representative may not have an interest in the affected estate or trust, and may not be related to a person interested in the estate or trust. The special representative is entitled to reasonable compensation for services, which must be paid from the principal of the estate or trust whose beneficiaries are represented.

(4) The special representative shall be discharged from any responsibility and shall have no further duties with respect to the estate or trust or with respect to any person interested in the estate or trust, on the earlier of:

(a) The expiration of six (6) months from the date the special representative was appointed, unless the order appointing the special representative provides otherwise; or

(b) The execution of the written agreement by all parties or their virtual representatives.

(5) Any action against a special representative must be brought before the earlier of:

(a) One (1) year from the discharge of the special representative; or

(b) The entry of an order by a court of competent jurisdiction under section 15-8-304, Idaho Code, approving the written agreement executed by all interested parties in accordance with the provisions of section 15-8-302, Idaho Code. [I.C., § 15-8-305, as added by 2005, ch. 122, § 1, p. 397.]

## STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

## CHAPTER 9

### FOREIGN GUARDIANSHIPS AND CONSERVATORSHIPS

#### PART 1. RECEIPT AND ACCEPTANCE OF FOREIGN GUARDIANSHIP

##### SECTION.

15-9-101. Jurisdiction.

15-9-102. Petition.

15-9-103. Notice of petition for receipt and acceptance of a foreign guardianship.

15-9-104. Hearing on the petition for receipt and acceptance of a foreign guardianship.

15-9-105. Requirements for receipt and acceptance of a foreign guardianship.

15-9-106. Review of the guardianship.

#### PART 2. RECEIPT AND ACCEPTANCE OF FOREIGN CONSERVATORSHIP

##### SECTION.

15-9-201. Jurisdiction.

15-9-202. Petition.

15-9-203. Notice of petition for receipt and acceptance of a foreign conservatorship.

15-9-204. Hearing on the petition for receipt and acceptance of a foreign conservatorship.

15-9-205. Requirements for receipt and acceptance of foreign conservatorship.

15-9-206. Review of the conservatorship.

## PART 1. RECEIPT AND ACCEPTANCE OF FOREIGN GUARDIANSHIP

**15-9-101. Jurisdiction.** — A guardian who is appointed by a foreign court of competent jurisdiction for an incapacitated or developmentally disabled person (hereinafter “ward”) residing or domiciled in this state may petition to have the guardianship transferred and accepted in this state. [I.C., § 15-9-101, as added by 2006, ch. 182, § 6, p. 565; am. 2008, ch. 73, § 1, p. 192.]

## STATUTORY NOTES

**Amendments.** — The 2008 amendment, by ch. 73, inserted “or developmentally disabled.”

**Compiler’s Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**15-9-102. Petition.** — (1) The petition for the receipt and acceptance of a foreign guardianship shall be filed in the court where the ward resides or is domiciled or where the ward may reside in the future.

(2) The petition shall include the following:

(a) A certified copy of the foreign guardianship order including:

(i) All attachments describing the duties and powers of the guardian; and

(ii) All amendments or modifications to the foreign guardianship order entered subsequent to the original order, including the order to transfer the guardianship, if applicable;

(b) The address of the foreign court from which the guardianship was issued;

(c) A listing of any other guardianship petitions that are pending in any jurisdiction and the names and addresses of the courts where the petitions have been filed;

(d) The petitioner’s name, residence, current address and relationship, other than guardian, to the ward;

(e) The name, age, principal residence and current address of the ward;

(f) The name and address of the ward’s:

(i) Spouse; and

(ii) Adult children or, if the ward has none, the ward’s parents and adult siblings or, if the ward has none, at least one (1) adult nearest in kinship to the ward if such adult can be found;

(g) The name and address of the person responsible for the care or custody of the ward if other than the guardian;

(h) The name and address of any legal representative, including a guardian ad litem appointed by the foreign court, for the ward;

(i) The reason(s) for the transfer of the guardianship; and

(j) If the guardian manages any property for the ward, a general statement of the ward’s property, its location, and its estimated value including any insurance or pension, and the source and amount of any other anticipated income or receipts.

(3) The petition for receipt and acceptance of a foreign guardianship may be supplemented with other petitions related to the guardianship including

a petition to modify the terms of the guardianship. [I.C., § 15-9-102, as added by 2006, ch. 182, § 6, p. 565.]

**15-9-103. Notice of petition for receipt and acceptance of a foreign guardianship.** — (1) Notice of the petition for receipt and acceptance of a foreign guardianship shall be served personally on the ward. Except as provided in subsection (3) of this section, failure to serve the ward with the foregoing notice precludes the court from granting the petition. The notice shall be in plain language and large type and shall:

- (a) Include a statement that the ward has a right to a hearing on the petition for receipt and acceptance of a foreign guardianship;
- (b) Inform the ward of procedures to exercise his or her right to a hearing; and
- (c) Describe the consequences of a transfer of the guardianship from the foreign jurisdiction to this state.

(2) Notice of the petition for receipt and acceptance of a foreign guardianship shall be given to the court from which the guardianship is to be transferred. Except as provided in subsection (3) of this section, failure to give the foreign court notice of the petition for receipt and acceptance of a foreign guardianship or to procure the requested certifications and copies of guardianship documents precludes the court from granting the petition. Notice to the foreign court shall include a request that the foreign court:

(a) Certify:

- (i) That the foreign court has no knowledge that the guardian has engaged in malfeasance, misfeasance or nonfeasance during his or her appointment as guardian;
  - (ii) That periodic reports have been filed in a satisfactory manner;
  - (iii) That all bond or other security requirements imposed under the guardianship have been performed; and
- (b) Forward copies of all documents filed with the foreign court relevant to the guardianship including, but not limited to:
- (i) The initial petition for guardianship and other filings relevant to the appointment of the guardian;
  - (ii) Reports and recommendations of guardians ad litem, court visitors, or other individuals appointed by the foreign court to evaluate the appropriateness of the guardianship;
  - (iii) Reports of physical or mental health practitioners describing the capacity of the ward to care for himself or herself or to manage his or her affairs;
  - (iv) Periodic status reports on the condition of the ward and the ward's assets; and
  - (v) The order to transfer the guardianship, if any.

(3) The court may waive the notice provisions in subsections (1) and (2) of this section if:

- (a) The guardian has filed a petition in the foreign court to transfer and release the guardianship to this state;
- (b) Notice was given to the ward in conjunction with the petition to transfer and release the guardianship; and



(c) The petitioner provides the court with:

- (i) A certified copy of the petition filed with the foreign court; and
- (ii) Proof of service on the ward. Proof of service shall not be dated more than ninety (90) days before the petition and acceptance of a foreign guardianship is filed in the court.

(4) The petitioner shall give notice of the petition for receipt and acceptance of a foreign guardianship to all other interested persons named in the petition, including any legal counsel appointed or retained for the ward or any guardian ad litem or court visitor appointed for the ward. The notice shall include a statement informing these persons of the right to object to the receipt and acceptance of the guardianship from the foreign jurisdiction to this state. Failure to give notice under this subsection precludes the receipt and acceptance of the guardianship.

(5) All persons receiving notice under this section shall have thirty (30) days from the mailing of notice to request a hearing on the petition for receipt and acceptance of the foreign guardianship. [I.C., § 15-9-103, as added by 2006, ch. 182, § 6, p. 565.]

**15-9-104. Hearing on the petition for receipt and acceptance of a foreign guardianship.** — (1) On motion by the ward, by any person named in the petition, or by any other interested person, or on the court's own motion, the court shall hold a hearing to consider the petition for receipt and acceptance of a foreign guardianship.

(2) If the petition for receipt and acceptance of a foreign guardianship includes a request to modify the provisions of the guardianship, the court shall hold a hearing to consider the petition for receipt and acceptance of a foreign guardianship.

(3) All procedural rights associated with a guardianship hearing before the court shall be observed for any hearings on the petition for receipt and acceptance of a foreign guardianship.

(4) If any interested person receiving notice of the petition for receipt and acceptance of a foreign guardianship challenges the validity of the foreign guardianship or the authority of the foreign court to appoint the guardian, the court may stay this proceeding while the petitioner is afforded the opportunity to have the foreign court hear the challenge and determine its merits. [I.C., § 15-9-104, as added by 2006, ch. 182, § 6, p. 565.]

**15-9-105. Requirements for receipt and acceptance of a foreign guardianship.** — (1) The court shall grant the petition for receipt and acceptance of a foreign guardianship provided that:

- (a) The guardian is presently in good standing with the foreign court;
- (b) The guardian is not moving or has not moved the ward or the ward's property from the foreign jurisdiction for the purpose of avoiding or circumventing the provisions of the guardianship order; and
- (c) The transfer of the guardianship from the foreign jurisdiction is in the best interests of the ward.

(2) In granting a petition for receipt and acceptance of a foreign guardianship, the court shall give full faith and credit to the provisions of the

foreign guardianship order concerning the determination of the ward's incapacity and the rights, powers and duties of the guardian.

(3) Notwithstanding subsection (2) of this section, the court may modify the provisions of the guardianship with respect to surety bond requirements or other administrative provisions to bring the guardianship into compliance with the laws of this state or the rules of the court.

(4) The court may require the guardian to file an accounting of the ward's property at the time of the transfer from the foreign jurisdiction to the extent the guardian has control thereof.

(5) If the petition for receipt and acceptance of a foreign guardianship is granted, the court shall coordinate with the foreign court to facilitate the orderly transfer of the guardianship. To coordinate the transfer, the court is authorized to:

- (a) Delay the effective date of the receipt and acceptance;
- (b) Make the receipt and acceptance contingent upon the release of the guardianship or the termination of the guardianship and the discharge of the guardian in the foreign jurisdiction;
- (c) Recognize concurrent jurisdiction over the guardianship for a reasonable period of time to permit the foreign court to release the guardianship or to terminate the guardianship and discharge the guardian in the foreign jurisdiction; or
- (d) Make other arrangements that, in the sound discretion of the court, are necessary to effectuate the receipt and acceptance of the guardianship.

(6) The denial of a petition for receipt and acceptance of a guardianship does not affect the right of a guardian appointed by a foreign court of competent jurisdiction to petition for guardianship under part 3, chapter 5, title 15, Idaho Code. [I.C., § 15-9-105, as added by 2006, ch. 182, § 6, p. 565.]

**15-9-106. Review of the guardianship.** — (1) Within a reasonable period of time after the receipt and acceptance of the foreign guardianship, the court shall review the provisions of the guardianship.

(2) As part of its review, the court shall inform the guardian and ward of services that may be available to the ward.

(3) Upon petition by the guardian, the ward, or by another interested person, the court may modify the type of appointment or powers granted to the guardian in accordance with the provisions of section 15-3-313 [15-5-313], Idaho Code. [I.C., § 15-9-106, as added by 2006, ch. 182, § 6, p. 565.]

#### STATUTORY NOTES

**Compiler's Notes.** — The bracketed insertion in subsection (3) was added by the compiler to correct the statutory reference.

## PART 2. RECEIPT AND ACCEPTANCE OF FOREIGN CONSERVATORSHIP

**15-9-201. Jurisdiction.** — A conservator who is appointed by a foreign court of competent jurisdiction for an incapacitated or developmentally disabled person (hereinafter “protected person”) residing in or domiciled in this state, may petition to have the conservatorship transferred to and accepted in this state. [I.C., § 15-9-201, as added by 2006, ch. 182, § 6, p. 565; am. 2008, ch. 73, § 2, p. 193.]

## STATUTORY NOTES

**Amendments.** — The 2008 amendment, by ch. 73, inserted “or developmentally disabled.”

**Compiler’s Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**15-9-202. Petition.** — (1) The petition for the receipt and acceptance of a foreign conservatorship shall be filed in the court where the protected person resides, is domiciled, or where the protected person may reside in the future.

(2) The petition shall include the following:

(a) A certified copy of the foreign conservatorship order, including:

(i) All attachments describing the duties and powers of the conservator; and

(ii) All amendments or modifications to the foreign conservatorship order entered subsequent to the original order, including the order to transfer the conservatorship, if applicable;

(b) The address of the foreign court from which the conservatorship was issued;

(c) A listing of any other conservatorship petitions that are pending in any jurisdiction and the names and addresses of the courts where the petitions have been filed;

(d) The petitioner’s name, residence, current address and relationship, other than guardian, to the protected person;

(e) The name, age, principal residence and current address of the protected person;

(f) The name and address of the protected person’s:

(i) Spouse; and

(ii) Adult children or, if the protected person has none, the protected person’s parents and adult siblings or, if the protected person has none, at least one (1) adult nearest in kinship to the protected person if such person can be found;

(g) The name and address of the person responsible for the care or custody of the protected person, if other than the conservator;

(h) The name and address of any legal representative, including a guardian ad litem appointed by the foreign court, for the protected person;

(i) The reason(s) for the transfer of the conservatorship; and

(j) A general statement of the protected person’s property, its location, and its estimated value including any insurance or pension, and the source and amount of any other anticipated income or receipts.



(3) The petition for receipt and acceptance of a foreign conservatorship may be supplemented with other petitions related to the conservatorship, including a petition to modify the terms of the conservatorship. [I.C., § 15-9-202, as added by 2006, ch. 182, § 6, p. 565.]

**15-9-203. Notice of petition for receipt and acceptance of a foreign conservatorship.** — (1) Notice of the petition for receipt and acceptance of a foreign conservatorship shall be served personally on the protected person. Except as provided in subsection (3) of this section, failure to serve the protected person with the foregoing notice precludes the court from granting the petition. The notice shall be in plain language and large type and shall:

- (a) Include a statement that the protected person has a right to a hearing on the petition for receipt and acceptance of a foreign conservatorship;
- (b) Inform the protected person of procedures to exercise his or her right to a hearing; and
- (c) Describe the consequences of a transfer of the conservatorship from the foreign jurisdiction to this state.

(2) Notice of the petition for receipt and acceptance of a foreign conservatorship shall be given to the court from which the guardianship is to be transferred. Except as provided in subsection (3) of this section, failure to give the foreign court notice of the petition for receipt and acceptance of a foreign conservatorship or to procure the requested certifications and copies of conservatorship documents precludes the court from granting the petition. Notice to the foreign court shall include a request that the foreign court:

(a) Certify:

- (i) That the foreign court has no knowledge that the conservator has engaged in malfeasance, misfeasance or nonfeasance during his or her appointment as conservator;
  - (ii) That periodic reports have been filed in a satisfactory manner;
  - (iii) That all bond or other security requirements imposed under the conservatorship have been performed; and
- (b) Forward copies of all documents filed with the foreign court relevant to the conservatorship including, but not limited to:
- (i) The initial petition for conservatorship and other filings relevant to the appointment of the conservator;
  - (ii) Reports and recommendations of guardians ad litem, court visitors, or other individuals appointed by the foreign court to evaluate the appropriateness of the conservatorship;
  - (iii) Reports of physical or mental health practitioners describing the capacity of the protected person to care for himself or herself or to manage his or her affairs;
  - (iv) Periodic status reports on the condition of the protected person and the protected person's assets; and
  - (v) The order to transfer the conservatorship, if any.

(3) The court may waive the notice provisions in subsections (1) and (2) of this section if:

- (a) The conservator has filed a petition in the foreign court to transfer and release the conservatorship to this state;
- (b) Notice was given to the protected person in conjunction with the petition to transfer and release the conservatorship; and
- (c) The petitioner provides the court with:
  - (i) A certified copy of the petition filed with the foreign court; and
  - (ii) Proof of service on the protected person. Proof of service shall not be dated more than ninety (90) days before the petition and acceptance of a foreign conservatorship is filed in the court.
- (4) The petitioner shall give notice of the petition for receipt and acceptance of a foreign conservatorship to all other interested persons named in the petition, including any legal counsel appointed or retained for the protected person or any guardian ad litem or court visitor appointed for the protected person. The notice shall include a statement informing these persons of the right to object to the receipt and acceptance of the conservatorship from the foreign jurisdiction to this state. Failure to give notice under this subsection precludes the receipt and acceptance of the conservatorship.
- (5) All persons receiving notice under this section shall have thirty (30) days from the mailing of notice to request a hearing on the petition for receipt and acceptance of the foreign conservatorship. [I.C., § 15-9-203, as added by 2006, ch. 182, § 6, p. 565.]

**15-9-204. Hearing on the petition for receipt and acceptance of a foreign conservatorship.** — (1) On motion by the protected person, by a person named in the petition, or by any other interested person, or on the court's own motion, the court shall hold a hearing to consider the petition for receipt and acceptance of a foreign conservatorship.

(2) If the petition for receipt and acceptance of a foreign conservatorship includes a request to modify the provisions of the guardianship, the court shall hold a hearing to consider the petition for receipt and acceptance of a foreign conservatorship.

(3) All procedural rights associated with a conservatorship hearing before the court shall be observed for any hearings on the petition for receipt and acceptance of a foreign conservatorship.

(4) If any interested person receiving notice of the petition for receipt and acceptance of a foreign conservatorship challenges the validity of the foreign conservatorship or the authority of the foreign court to appoint the conservator, the court may stay this proceeding while the petitioner is afforded the opportunity to have the foreign court hear the challenge and determine its merits. [I.C., § 15-9-204, as added by 2006, ch. 182, § 6, p. 565.]

**15-9-205. Requirements for receipt and acceptance of foreign conservatorship.** — (1) The court shall grant the petition for receipt and acceptance of a foreign conservatorship provided that:

- (a) The conservator is presently in good standing with the foreign court;
- (b) The conservator is not moving or has not moved the protected person or the protected person's property from the foreign jurisdiction for the

purpose of avoiding or circumventing the provisions of the conservatorship order; and

(c) The transfer of the conservatorship from the foreign jurisdiction is in the best interests of the protected person.

(2) In granting a petition for receipt and acceptance of a foreign conservatorship, the court shall give full faith and credit to the provisions of the foreign conservatorship order concerning the determination of the protected person's incapacity and the rights, powers and duties of the conservator.

(3) Notwithstanding subsection (2) of this section, the court may modify the provisions of the conservatorship with respect to surety bond requirements or other administrative provisions to bring the conservatorship into compliance with the laws of this state or the rules of the court.

(4) The court may require the conservator to file an accounting of the protected person's property at the time of the transfer from the foreign jurisdiction to the extent the conservator has control thereof.

(5) If the petition for receipt and acceptance of a foreign conservatorship is granted, the court shall coordinate with the foreign court to facilitate the orderly transfer of the conservatorship. To coordinate the transfer, the court is authorized to:

(a) Delay the effective date of the receipt and acceptance;

(b) Make the receipt and acceptance contingent upon the release of the conservatorship or the termination of the conservatorship and the discharge of the conservator in the foreign jurisdiction;

(c) Recognize concurrent jurisdiction over the conservatorship for a reasonable period of time to permit the foreign court to release the conservatorship or to terminate the conservatorship and discharge the conservator in the foreign jurisdiction; or

(d) Make other arrangements that, in the sound discretion of the court, are necessary to effectuate the receipt and acceptance of the conservatorship.

(6) The denial of a petition for receipt and acceptance of a conservatorship does not affect the right of a conservator appointed by a foreign court of competent jurisdiction to petition for conservatorship under part 4, chapter 5, title 15, Idaho Code. [I.C., § 15-9-205, as added by 2006, ch. 182, § 6, p. 565.]

**15-9-206. Review of the conservatorship.** — (1) Within a reasonable period of time after the receipt and acceptance of the foreign conservatorship, the court shall review the provisions of the conservatorship.

(2) As part of its review, the court shall inform the conservator and protected person of services that may be available to the protected person.

(3) Upon petition by the conservator, by the protected person, or by another interested person, the court may modify the type of appointment or powers granted to the conservator in accordance with the provisions of part 4, chapter 5, title 15, Idaho Code. [I.C., § 15-9-206, as added by 2006, ch. 182, § 6, p. 565.]



CHAPTER 10

TRANSFERS OF GUARDIANSHIPS AND CONSERVATORSHIPS TO A FOREIGN JURISDICTION

PART 1. TRANSFER OF GUARDIANSHIP TO A FOREIGN JURISDICTION

SECTION.

- 15-10-101. Jurisdiction.
- 15-10-102. Petition to transfer a guardianship to a foreign jurisdiction.
- 15-10-103. Notice of petition to transfer a guardianship to a foreign jurisdiction.
- 15-10-104. Hearing on the petition to transfer a foreign guardianship.
- 15-10-105. Requirements to transfer the guardianship to a foreign jurisdiction.

PART 2. TRANSFER OF CONSERVATORSHIP TO A FOREIGN JURISDICTION

SECTION.

- 15-10-201. Jurisdiction.
- 15-10-202. Petition to transfer a conservatorship to a foreign jurisdiction.
- 15-10-203. Notice of petition to transfer a conservatorship to a foreign jurisdiction.
- 15-10-204. Hearing on the petition to transfer a foreign conservatorship.
- 15-10-205. Requirements to transfer the conservatorship to a foreign jurisdiction.

PART 1. TRANSFER OF GUARDIANSHIP TO A FOREIGN JURISDICTION

**15-10-101. Jurisdiction.** — (1) A guardian may petition the court to transfer a guardianship to a foreign court of competent jurisdiction if the ward or developmentally disabled person has moved permanently to the foreign jurisdiction.

(2) The ward or developmentally disabled person may be presumed to have moved permanently to a foreign jurisdiction if:

- (a) He or she has resided in the foreign jurisdiction for more than twelve (12) consecutive months;
- (b) The guardian notifies the court that the ward or developmentally disabled person intends to move or has moved permanently to the foreign jurisdiction; or
- (c) A foreign court of competent jurisdiction notifies the court of the filing of a petition for guardianship of the ward or developmentally disabled person in the foreign jurisdiction.

(3) To facilitate the transfer, the court may order the guardian to file a petition for receipt and acceptance of the guardianship by the foreign jurisdiction.

(4) If the foreign jurisdiction does not have a procedure for receiving and accepting a foreign guardianship, the court may order the guardian to file a petition for guardianship in the foreign jurisdiction. [I.C., § 15-10-101, as added by 2006, ch. 182, § 7, p. 565; am. 2008, ch. 73, § 3, p. 193.]

STATUTORY NOTES

**Amendments.** — The 2008 amendment, added person” throughout subsections (1) and by ch. 73, inserted “or developmentally dis- (2).

**15-10-102. Petition to transfer a guardianship to a foreign jurisdiction.** — The petition to transfer a guardianship to a foreign jurisdiction shall be filed in the court that issued the guardianship order. The petition to

transfer the guardianship shall include the following:

- (1) Name and address of the foreign court to which the guardianship will be transferred;
- (2) New or proposed address of the ward;
- (3) Reason(s) for moving the ward;
- (4) A certified copy of the petition for receipt and acceptance of a foreign guardianship, or petition for guardianship, if previously filed in the foreign court; and
- (5) A statement of the ward's expressions of approval or disapproval concerning the transfer. [I.C., § 15-10-102, as added by 2006, ch. 182, § 7, p. 565.]

**15-10-103. Notice of petition to transfer a guardianship to a foreign jurisdiction.** — (1) Notice of the petition to transfer a guardianship to a foreign jurisdiction shall be served personally on the ward. The notice shall be in plain language and large type and shall:

- (a) Include a statement that the ward has a right to a hearing on the petition to transfer the guardianship;
- (b) Inform the ward of procedures to exercise his or her right to a hearing; and
- (c) Describe the consequences of a transfer of the guardianship.

(2) Notice of the petition to transfer a guardianship shall be given to the foreign court to which the guardianship is to be transferred. Except as provided in subsection (6) of this section, failure to give the foreign court notice of the petition to transfer the guardianship precludes the court from granting the petition.

(3) The petitioner shall give notice of the petition to transfer the guardianship to a foreign jurisdiction. The notice shall include a statement informing these persons of the right to object to the transfer of the guardianship to a foreign jurisdiction. Failure to give notice under this subsection (3) precludes the transfer of the guardianship. The notice shall be given to:

- (a) The ward's spouse;
- (b) The ward's adult children or, if the ward has none, the ward's parents and adult siblings or, if the ward has none, at least one (1) adult nearest in kinship to the ward if such adult can be found;
- (c) The ward's legal representatives, if any, including the guardian ad litem appointed by the court;
- (d) The person responsible for the care or custody of the ward; and
- (e) Other persons as directed by the court.

(4) Except as provided in subsection (1) of this section, notice of the petition to transfer a guardianship to a foreign jurisdiction shall be made according to section 15-5-309, Idaho Code.

(5) All persons to whom notice is given under this section shall have thirty (30) days from the mailing of the notice to request a hearing on the petition to transfer the guardianship to a foreign jurisdiction.

(6) The court may waive the notice requirement in subsections (1) through (3) of this section if:

(a) The guardian has filed a petition for receipt and acceptance of a foreign guardianship, or a petition for guardianship, in the foreign court; (b) Notice was given to the ward and all interested persons in conjunction with the petition for receipt and acceptance of a foreign guardianship; and (c) The petitioner provides the court with proof of service on the ward and all interested persons. Proof of service shall be dated not more than ninety (90) days before the petition to transfer the guardianship was filed in the court. [I.C., § 15-10-103, as added by 2006, ch. 182, § 7, p. 565.]

**15-10-104. Hearing on the petition to transfer a foreign guardianship.** — (1) On the court's own motion or on a motion by the ward or by any interested person named in the petition, or by any other interested person, the court may hold a hearing to consider the petition to transfer the guardianship to a foreign jurisdiction.

(2) All procedural rights associated with a guardianship hearing before the court shall be observed for any hearings on the petition for transfer of a guardianship to a foreign jurisdiction. [I.C., § 15-10-104, as added by 2006, ch. 182, § 7, p. 565.]

**15-10-105. Requirements to transfer the guardianship to a foreign jurisdiction.** — (1) The court shall transfer a guardianship to a foreign court of competent jurisdiction if:

- (a) The guardian is presently in good standing with the court;
- (b) The guardian is not moving or has not moved the ward or the ward's property to the foreign jurisdiction for the purpose of avoiding or circumventing the provisions to the guardianship order; and
- (c) The transfer of the guardianship to the foreign jurisdiction is in the best interests of the ward.

(2) The court shall coordinate efforts with the foreign court to facilitate the orderly transfer of the guardianship. To coordinate the transfer, the court may:

- (a) Notify the foreign court:
  - (i) Of any significant problems that may have occurred;
  - (ii) That periodic reports and accountings have been filed in a satisfactory manner; and
  - (iii) That all bond and other security requirements imposed under the guardianship have been performed;
- (b) Forward copies of all documents filed with the court relevant to the guardianship including, but not limited to:
  - (i) The initial petition for guardianship and other filings relevant to the appointment of the guardian;
  - (ii) Reports and recommendations of guardians ad litem, court visitors, or other individuals appointed by the court to evaluate the appropriateness of the guardianship;
  - (iii) Reports of physical or mental health practitioners describing the capacity of the ward to care for himself or herself or to manage the ward's affairs;
  - (iv) Periodic status reports on the condition of the ward and the ward's assets; and



(c) Require the guardian to file an accounting of the ward's property at the time of the transfer to the foreign jurisdiction.

(3) As necessary to coordinate the transfer of the guardianship, the court is authorized to:

(a) Delay the effective date of the transfer;

(b) Make the transfer contingent upon the acceptance of the guardianship or appointment of the guardian in the foreign jurisdiction;

(c) Recognize concurrent jurisdiction over the guardianship for a reasonable period of time to permit the foreign court to accept the guardianship or appoint the guardian in the foreign jurisdiction; or

(d) Make other arrangements that, in the sound discretion of the court, are necessary to transfer the guardianship. [I.C., § 15-10-105, as added by 2006, ch. 182, § 7, p. 565.]

## PART 2. TRANSFER OF CONSERVATORSHIP TO A FOREIGN JURISDICTION

**15-10-201. Jurisdiction.** — (1) A conservator may petition the court to transfer a conservatorship to a foreign court of competent jurisdiction if the protected or developmentally disabled person has moved permanently to the foreign jurisdiction.

(2) The protected or developmentally disabled person may be presumed to have moved permanently to a foreign jurisdiction if:

(a) He or she has resided in the foreign jurisdiction for more than twelve (12) consecutive months;

(b) The conservator notifies the court that the protected or developmentally disabled person intends to move or has moved permanently to the foreign jurisdiction; or

(c) A foreign court of competent jurisdiction notifies the court of the filing of a petition for conservatorship of the protected or developmentally disabled person in the foreign jurisdiction.

(3) To facilitate the transfer, the court may order the conservator to file a petition for receipt and acceptance of the conservatorship by the foreign jurisdiction.

(4) If the foreign jurisdiction does not have a procedure for receiving and accepting a foreign conservatorship, the court may order the conservator to file a petition for conservatorship in the foreign jurisdiction. [I.C., § 15-10-201, as added by 2006, ch. 182, § 7, p. 565; am. 2008, ch. 73, § 4, p. 193.]

## STATUTORY NOTES

**Amendments.** — The 2008 amendment, by ch. 73, inserted "or developmentally disabled" throughout subsections (1) and (2).

**15-10-202. Petition to transfer a conservatorship to a foreign jurisdiction.** — The petition to transfer a conservatorship to a foreign jurisdiction shall be filed in the court that issued the conservatorship order. The petition to transfer the conservatorship shall include the following:

- (1) Name and address of the foreign court to which the conservatorship will be transferred;
- (2) New or proposed address of the protected person;
- (3) Reason(s) for moving the protected person;
- (4) A certified copy of the petition for receipt and acceptance of a foreign conservatorship, or petition for conservatorship, if previously filed in the foreign court; and
- (5) A statement of the protected person's expressions of approval or disapproval concerning the transfer. [I.C., § 15-10-202, as added by 2006, ch. 182, § 7, p. 565.]

**15-10-203. Notice of petition to transfer a conservatorship to a foreign jurisdiction.** — (1) Notice of the petition to transfer a conservatorship to a foreign jurisdiction shall be served personally on the protected person. The notice shall be in plain language and large type and shall:

- (a) Include a statement that the protected person has a right to a hearing on the petition to transfer the conservatorship;
  - (b) Inform the protected person of procedures to exercise his or her right to a hearing; and
  - (c) Describe the consequences of a transfer of the conservatorship.
- (2) Notice of the petition to transfer a conservatorship shall be given to the foreign court to which the conservatorship is to be transferred. Except as provided in subsection (6) of this section, failure to give the foreign court notice of the petition to transfer the conservatorship precludes the court from granting the petition.

(3) The petitioner shall give notice of the petition to transfer the conservatorship to a foreign jurisdiction. The notice shall include a statement informing these persons of the right to object to the transfer of the conservatorship to a foreign jurisdiction. Failure to give notice under this subsection (3) precludes the transfer of the conservatorship. The notice shall be given to:

- (a) The protected person's spouse;
  - (b) The protected person's adult children or, if the protected person has none, the protected person's parents and adult siblings or, if the protected person has none, at least one (1) adult nearest in kinship to the protected person if such adult can be found;
  - (c) The protected person's legal representatives, if any, including the conservator ad litem appointed by the court;
  - (d) The person responsible for the care or custody of the protected person; and
  - (e) Other persons as directed by the court.
- (4) Except as provided in subsection (1) of this section, notice of the petition to transfer a conservatorship to a foreign jurisdiction shall be made according to section 15-5-404, Idaho Code.

(5) All persons to whom notice is given under this section shall have thirty (30) days from the mailing of the notice to request a hearing on the petition to transfer the conservatorship to a foreign jurisdiction.

(6) The court may waive the notice requirement in subsections (1) through (3) of this section if:

(a) The conservator has filed a petition for receipt and acceptance of a foreign conservatorship, or a petition for conservatorship, in the foreign court;

(b) Notice was given to the protected person and all interested persons in conjunction with the petition for receipt and acceptance of a foreign conservatorship; and

(c) The petitioner provides the court with proof of service on the protected person and all interested persons. Proof of service shall be dated not more than ninety (90) days before the petition to transfer the conservatorship was filed in the court. [I.C., § 15-10-203, as added by 2006, ch. 182, § 7, p. 565.]

**15-10-204. Hearing on the petition to transfer a foreign conservatorship.** — (1) On the court's own motion or on a motion by the protected person or by any interested person named in the petition, or by any other interested person, the court may hold a hearing to consider the petition to transfer the conservatorship to a foreign jurisdiction.

(2) All procedural rights associated with a conservatorship hearing before the court shall be observed for any hearings on the petition for transfer of a conservatorship to a foreign jurisdiction. [I.C., § 15-10-204, as added by 2006, ch. 182, § 7, p. 565.]

**15-10-205. Requirements to transfer the conservatorship to a foreign jurisdiction.** — (1) The court shall transfer a conservatorship to a foreign court of competent jurisdiction if:

(a) The conservator is presently in good standing with the court;

(b) The conservator is not moving or has not moved the protected person or the protected person's property to the foreign jurisdiction for the purpose of avoiding or circumventing the provisions to the conservatorship order; and

(c) The transfer of the conservatorship to the foreign jurisdiction is in the best interests of the protected person.

(2) The court shall coordinate efforts with the foreign court to facilitate the orderly transfer of the conservatorship. To coordinate the transfer, the court may:

(a) Notify the foreign court:

(i) Of any significant problems that may have occurred;

(ii) That periodic reports and accountings have been filed in a satisfactory manner; and

(iii) That all bond and other security requirements imposed under the conservatorship have been performed;

(b) Forward copies of all documents filed with the court relevant to the conservatorship including, but not limited to:

(i) The initial petition for conservatorship and other filings relevant to the appointment of the conservator;

(ii) Reports and recommendations of conservators ad litem, court visitors, or other individuals appointed by the court to evaluate the appropriateness of the conservatorship;



- (iii) Reports of physical or mental health practitioners describing the capacity of the protected person to care for himself or herself or to manage the protected person’s affairs;
  - (iv) Periodic status reports on the condition of the protected person and the protected person’s assets; and
  - (c) Require the conservator to file an accounting of the protected person’s property at the time of the transfer to the foreign jurisdiction.
- (3) As necessary to coordinate the transfer of the conservatorship, the court is authorized to:
- (a) Delay the effective date of the transfer;
  - (b) Make the transfer contingent upon the acceptance of the conservatorship or appointment of the conservator in the foreign jurisdiction;
  - (c) Recognize concurrent jurisdiction over the conservatorship for a reasonable period of time to permit the foreign court to accept the conservatorship or appoint the conservator in the foreign jurisdiction; or
  - (d) Make other arrangements that, in the sound discretion of the court, are necessary to transfer the conservatorship. [I.C., § 15-10-205, as added by 2006, ch. 182, § 7, p. 565.]

CHAPTER 11

TEMPORARY RECOGNITION OF FOREIGN GUARDIANSHIPS AND CONSERVATORSHIPS

PART 1. TEMPORARY RECOGNITION OF FOREIGN GUARDIANSHIPS	PART 2. TEMPORARY RECOGNITION OF FOREIGN CONSERVATORSHIPS
SECTION.	SECTION.
15-11-101. Jurisdiction.	15-11-201. Jurisdiction.
15-11-102. Petition and notice.	15-11-202. Petition and notice.
15-11-103. Requirements for temporary recognition of a foreign guardianship.	15-11-203. Requirements for temporary recognition of a foreign conservatorship.

PART 1. TEMPORARY RECOGNITION OF FOREIGN GUARDIANSHIPS

**15-11-101. Jurisdiction.** — A guardian who is appointed by a foreign court of competent jurisdiction for an incapacitated or developmentally disabled person (hereinafter “ward”) temporarily located in this state or whose property is located in this state, may petition to have the guardianship recognized in this state. For purposes of this part, “temporary” means a period of time not to exceed twelve (12) consecutive months. [I.C., § 15-11-101, as added by 2006, ch. 182, § 8, p. 565; am. 2008, ch. 73, § 5, p. 194.]

STATUTORY NOTES

**Amendments.** — The 2008 amendment, by ch. 73, inserted “or developmentally disabled.”

**Compiler’s Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**15-11-102. Petition and notice.** — (1) The petition for temporary recognition of a foreign guardianship shall be filed in the court where the ward or the ward's property is located.

(2) The petition shall include the following:

(a) A certified copy of the foreign guardianship order including:

(i) All attachments describing the duties and powers of the guardian; and

(ii) All amendments or modifications to the foreign guardianship order entered subsequent to the original order;

(b) The address of the foreign court from which the guardianship order was issued;

(c) The name of the judicial officer who authorized the foreign guardianship;

(d) An explanation of the need for temporary recognition of the foreign guardianship at this time; and

(e) A general statement of the ward's property located in this state and its estimated value.

(3) Notice of the petition for temporary recognition of a foreign guardianship shall be given to the foreign court from which the guardianship orders were issued. Failure to give the foreign court notice of the petition for temporary recognition of a foreign guardianship precludes the court from granting the petition. [I.C., § 15-11-102, as added by 2006, ch. 182, § 8, p. 565.]

**15-11-103. Requirements for temporary recognition of a foreign guardianship.** — (1) Upon satisfaction of the notice and petition requirements in section 15-11-102, Idaho Code, the foreign guardian shall be appointed guardian of the ward in this state without further notice or hearing. The guardianship shall be valid for up to twelve (12) months from the date of the appointment. Upon such appointment, the foreign guardian may deal with the ward in the same manner as a resident guardian. The foreign guardian shall account to the court of his or her original appointment for his or her actions in this state regarding the ward. The court, as a condition of appointment, may require the foreign guardian to appoint a resident agent for service of process and post an adequate surety bond or other security device to insure the faithful performance of his or her duties.

(2) A certified copy of the approved account shall be filed with the court prior to the discharge of the foreign guardian as guardian in this state. [I.C., § 15-11-103, as added by 2006, ch. 182, § 8, p. 565.]

## PART 2. TEMPORARY RECOGNITION OF FOREIGN CONSERVATORSHIPS

**15-11-201. Jurisdiction.** — A conservator who is appointed by a foreign court of competent jurisdiction for an incapacitated person (hereinafter "protected person") temporarily located in this state or whose property is located in this state, may petition to have the conservatorship recognized in this state. For purposes of this part, "temporary" means a period of time not to exceed twelve (12) consecutive months. [I.C., § 15-11-201, as added by 2006, ch. 182, § 8, p. 565.]

## STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**15-11-202. Petition and notice.** — (1) The petition for temporary recognition of a foreign conservatorship shall be filed in the court where the protected person or the protected person's property is located.

(2) The petition shall include the following:

(a) A certified copy of the foreign conservatorship order including:

(i) All attachments describing the duties and powers of the conservator; and

(ii) All amendments or modifications to the foreign conservatorship order entered subsequent to the original order;

(b) The address of the foreign court from which the conservatorship order was issued;

(c) The name of the judicial officer who authorized the foreign conservatorship;

(d) An explanation of the need for temporary recognition of the foreign conservatorship at this time; and

(e) A general statement of the protected person's property located in this state and its estimated value.

(3) Notice of the petition for temporary recognition of a foreign conservatorship shall be given to the foreign court from which the conservatorship orders were issued. Failure to give the foreign court notice of the petition for temporary recognition of a foreign conservatorship precludes the court from granting the petition. [I.C., § 15-11-202, as added by 2006, ch. 182, § 8, p. 565.]

**15-11-203. Requirements for temporary recognition of a foreign conservatorship.** — (1) Upon satisfaction of the notice and petition requirements in section 15-11-202, Idaho Code, the foreign conservator shall be appointed conservator of the protected person in this state without further notice or hearing. The conservatorship shall be valid for up to twelve (12) months from the date of the appointment. Upon such appointment, the foreign conservator may deal with the protected person in the same manner as a resident conservator. The foreign conservator shall account to the court of his or her original appointment for his or her actions in this state regarding the protected person. The court, as a condition of appointment, may require the foreign conservator to appoint a resident agent for service of process and post an adequate surety bond or other security device to insure the faithful performance of his or her duties.

(2) A certified copy of the approved account shall be filed with the court prior to the discharge of the foreign conservator as conservator in this state. [I.C., § 15-11-203, as added by 2006, ch. 182, § 8, p. 565.]



## CHAPTER 12

## UNIFORM POWER OF ATTORNEY ACT

## PART 1. GENERAL PROVISIONS AND DEFINITIONS

## SECTION.

- 15-12-101. Short title.
- 15-12-102. Definitions.
- 15-12-103. Applicability.
- 15-12-104. Power of attorney is durable.
- 15-12-105. Execution of power of attorney.
- 15-12-106. Validity of power of attorney.
- 15-12-107. Meaning and effect of power of attorney.
- 15-12-108. Nomination of conservator; relation of agent to court-appointed fiduciary.
- 15-12-109. When power of attorney effective.
- 15-12-110. Termination of power of attorney or agent's authority.
- 15-12-111. Coagents and successor agents.
- 15-12-112. Reimbursement and compensation of agent.
- 15-12-113. Agent's acceptance.
- 15-12-114. Agent's duties.
- 15-12-115. Exoneration of agent.
- 15-12-116. Judicial relief.
- 15-12-117. Agent's liability.
- 15-12-118. Agent's resignation — Notice.
- 15-12-119. Acceptance of and reliance upon an acknowledged power of attorney.
- 15-12-120. Liability for refusal to accept an acknowledged power of attorney.
- 15-12-121. Principles of law and equity.
- 15-12-122. Laws applicable to financial institutions and entities.
- 15-12-123. Remedies under other law.

## PART 2. AUTHORITY

- 15-12-201. Authority that requires specific grant — Grant of general authority.

## SECTION.

- 15-12-202. Incorporation of authority.
- 15-12-203. Construction of authority generally.
- 15-12-204. Real property.
- 15-12-205. Tangible personal property.
- 15-12-206. Stocks and bonds.
- 15-12-207. Commodities and options.
- 15-12-208. Banks and other financial institutions.
- 15-12-209. Operation of an entity or business.
- 15-12-210. Insurance and annuities.
- 15-12-211. Estates, trusts and other beneficial interests.
- 15-12-212. Claims and litigation.
- 15-12-213. Personal and family maintenance.
- 15-12-214. Benefits from governmental programs or civil or military service.
- 15-12-215. Retirement plans.
- 15-12-216. Taxes.
- 15-12-217. Gifts.

## PART 3. STATUTORY FORMS

- 15-12-301. Statutory form power of attorney.
- 15-12-302. Agent's certification.

## PART 4. MISCELLANEOUS PROVISIONS

- 15-12-401. Uniformity of application and construction.
- 15-12-402. Relation to electronic signatures in global and national commerce act.
- 15-12-403. Effect on existing powers of attorney.

## OFFICIAL COMMENT

## Prefatory Note

The catalyst for the Uniform Power of Attorney Act (the "Act") was a national review of state power of attorney legislation. The review revealed growing divergence among states' statutory treatment of powers of attorney. The original Uniform Durable Power of Attorney Act ("Original Act"), last amended in 1987, was at one time followed by all but a few jurisdictions. Despite initial uniformity, the review found that a majority of states had enacted non-uniform provisions to deal with specific matters upon which the Original Act is silent. The topics about which there was

increasing divergence included: 1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal's marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability. Other topics about which states had legislated, although not necessarily in a divergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on authority that has the potential to dissipate a principal's property or alter a principal's estate plan.

A national survey was then conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) to ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model. The survey was distributed to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to special interest list serves of the ABA Commission on Law and Aging. Forty-four jurisdictions were represented in the 371 surveys returned.

The survey responses demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should:

- (1) provide for confirmation that contingent powers are activated;
- (2) revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;
- (3) include a portability provision;
- (4) require gift making authority to be expressly stated in the grant of authority;
- (5) provide a default standard for fiduciary duties;
- (6) permit the principal to alter the default fiduciary standard;
- (7) require notice by an agent when the agent is no longer willing or able to act;
- (8) include safeguards against abuse by the agent;
- (9) include remedies and sanctions for abuse by the agent;
- (10) protect the reliance of other persons on a power of attorney; and
- (11) include remedies and sanctions for refusal of other persons to honor a power of attorney.

Informed by the review and the survey results, the Conference's drafting process also incorporated input from the American College of Trust and Estate Counsel, the ABA Section of Real Property, Probate and Trust Law, the ABA Commission on Law and Aging, the Joint Editorial Board for Uniform Trust and Estate Acts, the National Conference of Lawyers and Corporate Fiduciaries, the American Bankers Association, AARP, other professional groups, as well as numerous individual lawyers and corporate counsel. As a result of this process, the Act codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent's authority and the need to prevent and redress financial abuse.

While the Act contains safeguards for the protection of an incapacitated principal, the Act is primarily a set of default rules that preserve a principal's freedom to choose both the extent of an agent's authority and the

principles to govern the agent's conduct. Among the Act's features that enhance drafting flexibility are the statutory definitions of powers in Article 2, which can be incorporated by reference in an individually drafted power of attorney or selected for inclusion on the optional statutory form provided in Article 3. The statutory definitions of enumerated powers are an updated version of those in the Uniform Statutory Form Power of Attorney Act (1988), which the Act supersedes. The national review found that eighteen jurisdictions had adopted some type of statutory form power of attorney. The decision to include a statutory form power of attorney in the Act was based on this trend and the proliferation of power of attorney forms currently available to the public.

Sections 119 [§ 15-12-119] and 120 [§ 15-12-120] of the Act address the problem of persons refusing to accept an agent's authority. Section 119 [§ 15-12-119] provides protection from liability for persons that in good faith accept an acknowledged power of attorney. Section 120 [§ 15-12-120] sanctions refusal to accept an acknowledged power of attorney unless the refusal meets limited statutory exceptions. An alternate Section 120 [§ 15-12-120] is provided for states that may wish to limit sanctions to refusal of an acknowledged statutory form power of attorney.

In exchange for mandated acceptance of an agent's authority, the Act does not require persons that deal with an agent to investigate the agent or the agent's actions. Instead, safeguards against abuse are provided through heightened requirements for granting authority that could dissipate the principal's property or alter the principal's estate plan (Section 201(a) [§ 15-12-201(1)]), provisions that set out the agent's duties and liabilities (Sections 114 and 117 [§§ 15-12-114 and 15-12-117]) and by specification of the categories of persons that have standing to request judicial review of the agent's conduct (Section 116 [§ 15-12-116]). The following provides a brief overview of the entire Act.

### Overview of the Uniform Power of Attorney Act

The Act consists of 4 articles. The basic substance of the Act is located in Articles 1 and 2. Article 3 contains the optional statutory form and Article 4 consists of miscellaneous provisions dealing with general application of the Act and repeal of certain prior acts.

**Article 1 — General Provisions and Definitions** — Section 102 [§ 15-12-102] lists definitions which are useful in interpretation of the Act. Of particular note is the definition of "incapacity" which replaces the term "disability" used in the Original Act. The



definition of “incapacity” is consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997. Another significant change in terminology from the Original Act is the use of “agent” in place of the term “attorney in fact.” The term “agent” was also used in the Uniform Statutory Form Power of Attorney Act and is intended to clarify confusion in the lay public about the meaning of “attorney in fact.” Section 103 [§ 15-12-103] provides that the Act is to apply broadly to all powers of attorney, but excepts from the Act powers of attorney for health care and certain specialized powers such as those coupled with an interest or dealing with proxy voting.

Another innovation is the default rule in Section 104 [§ 15-12-104] that a power of attorney is durable unless it contains express language indicating otherwise. This change from the Original Act reflects the view that most principals prefer their powers of attorney to be durable as a hedge against the need for guardianship. While the Original Act was silent on execution requirements for a power of attorney, Section 105 [§ 15-12-105] requires the principal’s signature and provides that an acknowledged signature is presumed genuine. Section 106 recognizes military powers of attorney and powers of attorney properly executed in other states or countries, or which were properly executed in the state of enactment prior to the Act’s effective date. Section 107 [§ 15-12-107] states a choice of law rule for determining the law that governs the meaning and effect of a power of attorney.

Section 108 [§ 15-12-108] addresses the relationship of the agent to a later court-appointed fiduciary. The Original Act conferred upon a conservator or other later-appointed fiduciary the same power to revoke or amend the power of attorney as the principal would have had prior to incapacity. In contrast, the Act reserves this power to the court and states that the agent’s authority continues until limited, suspended, or terminated by the court. This approach reflects greater deference for the previously expressed preferences of the principal and is consistent with the state legislative trend that has departed from the Original Act.

The default rule for when a power of attorney becomes effective is stated in Section 109. [§ 15-12-109] Unless the principal specifies that it is to become effective upon a future date, event, or contingency, the authority of an agent under a power of attorney becomes effective when the power is executed. Section 109 [§ 15-12-109] permits the principal to designate who may determine when contingent powers are triggered. If the trigger for contingent powers is the principal’s incapacity, Section 109 [§ 15-12-109] provides that

the person designated to make that determination has the authority to act as the principal’s personal representative under the Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing the principal’s health-care information and communicating with the principal’s health-care provider. This provision does not, however, confer on the designated person the authority to make health-care decisions for the principal. If the trigger for contingent powers is incapacity but the principal has not designated anyone to make the determination, or the person authorized is unable or unwilling to make the determination, the determination may be made by a physician or licensed psychologist, who must find that the principal’s ability to manage property or business affairs is impaired, or by an attorney at law, judge, or appropriate governmental official, who must find that the principal is missing, detained, or unable to return to the United States.

The bases for termination of a power of attorney are covered in Section 110 [§ 15-12-110]. In response to concerns expressed in the JEB survey, the Act provides as the default rule that authority granted to a principal’s spouse is revoked upon the commencement of proceedings for legal separation, marital dissolution or annulment.

Sections 111 through 118 [§§ 15-12-111 through 15-12-118] address matters related to the agent, including default rules for coagents and successor agents (Section 111 [§ 15-12-111]), reimbursement and compensation (Section 112 [§ 15-12-112]), an agent’s acceptance of appointment (Section 113 [§ 15-12-113]), and the agent’s duties (Section 114 [§ 15-12-114]). Section 115 [§ 15-12-115] provides that a principal may lower the standard of liability for agent conduct subject to a minimum level of accountability for actions taken dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. Section 116 [§ 15-12-116] sets out a comprehensive list of persons that may petition the court to review the agent’s conduct and Section 117 [§ 15-12-117] addresses agent liability. An agent may resign by following the notice procedures described in Section 118 [§ 15-12-118].

Sections 119 and 120 [§ 15-12-119 and 15-12-120] are included in the Act to address the frequently reported problem of persons refusing to accept a power of attorney. Section 119 [§ 15-12-119] protects persons that in good faith accept an acknowledged power of attorney without actual knowledge that the power of attorney is revoked, terminated, or invalid or that the agent is exceeding or improperly exercising the agent’s powers. Subject to statutory exceptions, alternative Sections 120



[§ 15-12-120] impose liability for refusal to accept a power of attorney. Alternative A sanctions refusal of an acknowledged power of attorney and Alternative B sanctions only refusal of an acknowledged statutory form power of attorney [Idaho adopted Alternative A.].

Sections 121 through 123 [§§ 15-12-121 through 15-12-123] address the relationship of the Act to other law. Section 121 [§ 15-12-121] clarifies that the Act is supplemented by the principles of common law and equity to the extent those principles are not displaced by a specific provision of the Act, and Section 122 [§ 15-12-122] further clarifies that the Act is not intended to supersede any law applicable to financial institutions or other entities. With respect to remedies, Section 123 [§ 15-12-123] provides that the remedies under the Act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

**Article 2 — Authority** — The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. Like the Uniform Statutory Form Power of Attorney Act, Sections 204 through 217 [§§ 15-12-204 through 15-12-217] of the Act set forth detailed descriptions of authority relating to subjects such as “real property,” “retirement plans,” and “taxes,” which a principal, pursuant to Section 202 [§ 15-12-202], may incorporate in full into the power of attorney either by a reference to the short descriptive term for the subject used in the Act or to the section number. Section 202 [§ 15-12-202] further states that a principal may modify in a power of attorney any authority incorporated by reference. The definitions in Article 2 also provide meaning for authority with respect to subjects enumerated on the optional statutory form in Article 3. Section 203 applies to all incorporated authority and grants of general authority, providing further detail on how the authority is to be construed.

Article 2 also addresses concerns about authority that might be used to dissipate the principal's property or alter the principal's estate plan. Section 201(a) [§ 15-12-201(1)] lists specific categories of authority that cannot be implied from a grant of general authority, but which may be granted only through express language in the power of attorney. Section 201(b) [§ 15-12-201(2)] contains a default rule prohibiting an agent that is not an ancestor, spouse, or descendant of the principal from creating in the agent or in a person to whom the agent owes a legal obligation of support an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

**Article 3 — Statutory Forms** — The optional form in Article 3 is designed for use by lawyers as well as lay persons. It contains, in plain language, instructions to the principal and agent. Step-by-step prompts are given for designation of the agent and successor agents, and grant of general and specific authority. In the section of the form addressing general authority, the principal must initial the subjects over which the principal wishes to delegate general authority to the agent. In the section of the form addressing specific authority, the Section 201(a) [§ 15-12-201(1)] categories of specific authority are listed, preceded by a warning to the principal about the potential consequences of granting such authority to an agent. The principal is instructed to initial only the specific categories of actions that the principal intends to authorize. Article 3 also contains a sample agent certification form.

**Article 4 — Miscellaneous Provisions** — The miscellaneous provisions in Article 4 clarify the relationship of the Act to other law and pre-existing powers of attorney. Enacting jurisdictions should repeal their existing power of attorney statutes, including, if applicable, the Uniform Durable Power of Attorney Act, The Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code.

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## PART 1. GENERAL PROVISIONS AND DEFINITIONS

**15-12-101. Short title.** — This chapter may be known and cited as the “Uniform Power of Attorney Act.” [I.C., § 15-12-101, as added by 2008, ch. 186, § 2, p. 560.]

### OFFICIAL COMMENT

The Uniform Power of Attorney Act replaces the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power

of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code. The primary purpose of the Uniform Durable Power of Attorney Act

was to provide individuals with an inexpensive, non-judicial method of surrogate property management in the event of later incapacity. Two key concepts were introduced by the Uniform Durable Power of Attorney Act: 1) creation of a durable agency — one that survives, or is triggered by, the principal's incapacity, and 2) validation of post-mortem exercise of powers by an agent who acts in good faith and without actual knowledge of the principal's death. The success of the Uniform Durable Power of Attorney Act is evidenced by the widespread use of durable powers in every jurisdiction, not only for incapacity planning, but also for convenience while the principal retains capacity. However, the limitations of the Uniform Durable Power of Attorney Act are evidenced by the number of states that have supplemented and revised their statutes to address myriad issues upon which the Uniform Durable Power of Attorney Act is silent. These issues include parameters for the creation and use of powers of attorney as well as guidelines for the principal, the agent, and the person who is asked to accept the agent's authority. The general provisions and definitions of Article 1 in the Uniform Power of Attorney Act address those issues.

In addition to providing greater detail than the Uniform Durable Power of Attorney Act, this Act changes two presumptions in the earlier act: 1) that a power of attorney is not durable unless it contains language to make it durable; and 2) that a later court-appointed fiduciary for the principal has the power to revoke or amend a previously executed power of attorney. Section 104 [§ 15-12-104] of this Article reverses the non-durability presumption by stating that a power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal. Section 108 gives deference to the principal's choice of agent by providing that if a court appoints a fiduciary to manage some or all of

the principal's property, the agent's authority continues unless limited, suspended, or terminated by the court.

Although the Act is primarily a default statute, Article 1 also contains rules that govern all powers of attorney subject to the Act. Examples of these rules include imposition of certain minimum fiduciary duties on an agent who has accepted appointment (Section 114(a) [§ 15-12-114(1)]), recognition of persons who have standing to request judicial construction of the power of attorney or review of the agent's conduct (Section 116 [§ 15-12-116]), and protections for persons who accept an acknowledged power of attorney without actual knowledge that the power of attorney or the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the power (Section 119 [§ 15-12-119]). In contrast with the rules of general application in Article 1, the default provisions are clearly indicated by signals such as "unless the power of attorney otherwise provides," or "except as otherwise provided in the power of attorney." These signals alert the draftsman to options for enlarging or limiting the Act's default terms. For example, default provisions in Article 1 state that, unless the power of attorney otherwise provides, the power of attorney is effective immediately (Section 109 [§ 15-12-109]), coagents may exercise their authority independently (Section 111 [§ 15-12-111]), and an agent is entitled to reimbursement of expenses reasonably incurred and to reasonable compensation (Section 112 [§ 15-12-112]).

This Act, which replaces the Uniform Durable Power of Attorney Act, does not contain the word "durable" in the title. Pursuant to Section 104 [§ 15-12-104], a power of attorney created under the Act is durable unless the power of attorney provides that it is terminated by the incapacity of the principal.

### **15-12-102. Definitions. —** In this chapter:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent or a person to which an agent's authority is delegated.

(2) "Durable" with respect to a power of attorney means not terminated by the principal's incapacity.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because:



(a) The individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(b) The individual is:

(i) Missing;

(ii) Detained, including incarcerated in a penal system; or

(iii) Outside the United States and unable to return.

(6) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(7) “Power of attorney” means a writing or other record which grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(8) “Presently exercisable general power of appointment” with respect to the property or property interest subject to the power means that the power is exercisable at the time in question to vest absolute ownership in the principal individually, the principal’s estate, the principal’s creditors, or the creditors of the principal’s estate. The term includes a power of appointment that is not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(9) “Principal” means an individual who grants authority to an agent in a power of attorney.

(10) “Property” means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(11) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) “Sign” means, with present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach to or logically associate with the record an electronic sound, symbol or process.

(13) “State” means a state of the United States, the District of Columbia, Puerto Rico, United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(14) “Stocks and bonds” means stocks, bonds, mutual funds and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner, except commodity futures contracts and call and put options on stocks and stock indexes. [I.C., § 15-12-102, as added by 2008, ch. 186, § 2, p. 560.]



## STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

## OFFICIAL COMMENT

Although most of the definitions in Section 102 [this section] are self-explanatory, a few of the terms warrant further comment.

“Agent” replaces the term “attorney in fact” used in the Uniform Durable Power of Attorney Act to avoid confusion in the lay public about the meaning of the term and the difference between an attorney in fact and an attorney at law. Agent was also used in the Uniform Statutory Form Power of Attorney Act which this Act supersedes.

“Incapacity” replaces the term “disability” used in the Uniform Durable Power of Attorney Act in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of incapacity stresses the operative consequences of the individual’s impairment-inability to manage property and business affairs-rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997.

The definition of “power of attorney” clarifies that the term applies to any grant of authority in a writing or other record from a principal to an agent which appears from the grant to be a power of attorney, without regard to whether the words “power of attorney” are actually used in the grant.

“Presently exercisable general power of appointment” is defined to clarify that where the phrase appears in the Act it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will. *Cf.* Restatement (Third) of Property (Wills and Don. Trans.) § 19.8 cmt. d (Tentative

Draft No. 5, approved 2006) (noting that unless the donor of a presently exercisable power of attorney has manifested a contrary intent, it is assumed that the donor intends that the donee’s agent be permitted to exercise the power for the benefit of the donee). Including in a power of attorney the authority to exercise a presently exercisable general power of appointment held by the principal is consistent with the objective of giving an agent comprehensive management authority over the principal’s property and financial affairs. The term appears in Section 211 [§ 15-12-211] (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal (*see* Section 211(b)(3) [§ 15-12-211(2)(c)]), and in Section 217 [§ 15-12-217] (Gifts) in the context of authority to exercise for the benefit of someone else a presently exercisable general power of appointment held by the principal (*see* Section 217(b)(1) [§ 15-12-217(2)(a)]). The term is also incorporated by reference when using the statutory form in Section 301 [§ 15-12-301] to grant authority with respect to “Estates, Trusts, and Other Beneficial Interests” or authority with respect to “Gifts.” If a principal wishes to delegate authority to exercise a power that the principal holds in a fiduciary capacity, Section 201(a)(7) [§ 15-12-201(1)(g)] requires that the power of attorney contain an express grant of such authority. Furthermore, delegation of a power held in a fiduciary capacity is possible only if the principal has authority to delegate the power, and the agent’s authority is necessarily limited by whatever terms govern the principal’s ability to exercise the power.

**15-12-103. Applicability.** — This chapter applies to all powers of attorney except:

(1) A power to the extent it is coupled with an interest in the subject of the power, including, but not limited to, a power given to or for the benefit of a creditor in connection with a credit transaction;

(2) A power to make health care decisions;

(3) A proxy or other delegation to exercise voting rights or management rights with respect to an entity; and

(4) A power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose. [I.C., § 15-12-103, as added by 2008, ch. 186, § 2, p. 561.]

## OFFICIAL COMMENT

The Uniform Power of Attorney Act is intended to be comprehensive with respect to delegation of surrogate decision making authority over an individual's property and property interests, whether for the purpose of incapacity planning or mere convenience. Given that an agent will likely exercise authority at times when the principal cannot monitor the agent's conduct, the Act specifies minimum agent duties and protections for the principal's benefit. These provisions, however, may not be appropriate for all delegations of authority that might otherwise be included within the definition of a power of attorney. Section 103 [this section] lists delegations of authority that are excluded from the Act because the subject matter of the delegation, the objective of the delegation, the agent's role with respect to the delegation, or a combination of the foregoing, would make application of the Act's provisions inappropriate.

Paragraph (1) excludes a power to the extent that it is coupled with an interest in the subject of the power. This exclusion addresses situations where, due to the agent's interest in the subject matter of the power, the agent is not intended to act as the principal's fiduciary. See Restatement (Third) of Agency § 3.12 (2006) and M.T. Brunner, Annotation, *What Constitutes Power Coupled with Interest within Rule as to Termination of Agency*, 28 A.L.R.2d 1243 (1953). Common examples of powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral. While the example of "a power given to or for the benefit of a creditor in connection with a credit transaction" is highlighted in paragraph (1), it is not meant to exclude application of paragraph (1) to other contexts in which a power may be coupled with an interest, such as a power held by an insurer to settle or confess judgment on behalf of an insured. See, e.g., *Hayes v. Gessner*, 52 N.E.2d 968 (Mass. 1944).

Paragraph (2) excludes from the Act delegations of authority to make health-care decisions for the principal. Such delegations are covered under other law of the jurisdiction. The Act recognizes, however, that matters of financial management and health-care decision making are often interdependent. The Act consequently provides in Section 114(b)(5) [§ 15-12-114(2)(e)] a default rule that an agent under the Act must cooperate with the principal's health-care decision maker.

Likewise, paragraph (3) excludes from the

Act a proxy or other delegation to exercise voting rights or management rights with respect to an entity. The rules with respect to those rights are typically controlled by entity-specific statutes within a jurisdiction. See, e.g., Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996). Notwithstanding the exclusion of such delegations from the operation of this Act, Section 209 [§ 15-12-209] contemplates that a power granted to an agent with respect to operation of an entity or business includes the authority to "exercise in person or by proxy ... a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds...." (see paragraph (5) of Section 209 [§ 15-12-209]). Thus, while a person that holds only a proxy pursuant to an entity voting statute will not be subject to the provisions of this Act, an agent that is granted Section 209 [§ 15-12-209] authority is subject to the Act because the principal has given the agent authority that is greater than that of a mere voting proxy. In fact, typical entity statutes contemplate that a principal's agent or "attorney in fact" may appoint a proxy on behalf of the principal. See, e.g., Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996).

Paragraph (4) excludes from the Act any power created on a governmental form for a governmental purpose. Like the excluded powers in paragraphs (2) and (3), the authority for a power created on a governmental form emanates from other law and is generally for a limited purpose. Notwithstanding this exclusion, the Act specifically provides in paragraph (7) of Section 203 [§ 15-12-203] that a grant of authority to an agent includes, with respect to that subject matter, authority to "prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or governmental regulation." Section 203 [§ 15-12-203], paragraph (8), further clarifies that the agent has the authority to "communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal." The intent of these provisions is to minimize the need for a special power on a governmental form with respect to any subject matter over which an agent is granted authority under the Act.

**15-12-104. Power of attorney is durable.** — A power of attorney created under this chapter is durable unless it expressly provides that it is



terminated by the incapacity of the principal. [I.C., § 15-12-104, as added by 2008, ch. 186, § 2, p. 561.]

#### OFFICIAL COMMENT

Section 104 [this section] establishes that a power of attorney created under the Act is durable unless it expressly states otherwise. This default rule is the reverse of the approach under the Uniform Durable Power of Attorney Act and based on the assumption that most principals prefer durability as a

hedge against the need for guardianship. *See also* Section 107 [§ 15-12-107] Comment (noting that the default rules of the jurisdiction's law under which a power of attorney is created, including the default rule for durability, govern the meaning and effect of a power of attorney).

**15-12-105. Execution of power of attorney.** — A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney, including as set forth in section 73-114, Idaho Code. The signature is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized to take acknowledgments, including as set forth in section 51-109(6), Idaho Code, or section 55-712B, Idaho Code. [I.C., § 15-12-105, as added by 2008, ch. 186, § 2, p. 561.]

#### OFFICIAL COMMENT

While notarization of the principal's signature is not required to create a valid power of attorney, this section strongly encourages the practice by according acknowledged signatures a statutory presumption of genuineness. Furthermore, because Section 119 [§ 15-12-119] (Acceptance of and Reliance Upon Acknowledged Power of Attorney) and alternative Sections 120 [§ 15-12-120] (Alternative A — Liability for Refusal to Accept Acknowledged Power of Attorney, and Alternative B — Liability for Refusal to Accept Acknowledged Statutory Form Power of Attorney) do not apply to unacknowledged powers, persons who are presented with an unacknowledged power of attorney may be reluctant to accept it. As a practical matter, an acknowledged signature is required if the power of attorney will be recorded by the agent in conjunction with the execution of real estate documents on behalf of the principal. *See* R.P.D., Annotation, *Recording Laws as Applied to Power of Attorney under which*

*Deed or Mortgage is Executed*, 114 A.L.R. 660 (1938).

This section, at a minimum, requires that the power of attorney be signed by the principal or by another individual who the principal has directed to sign the principal's name. If another individual is directed to sign the principal's name, the signing must occur in the principal's "conscious presence." The 1990 amendments to the Uniform Probate Code codified the "conscious presence" test for the execution of wills (Section 2-502(a)(2)), which generally requires that the signing is sufficient if it takes place within the range of the senses — usually sight or hearing — of the individual who directed that another sign the individual's name. *See* Unif. Probate Code § 2-502 cmt. (2003). For a discussion of acknowledgment of a signature by an individual whose name is signed by another, *see* R.L.M., Annotation, *Formal Acknowledgment of Instrument by One Whose Name is Signed thereto by Another as an Adoption of the Signature*, 57 A.L.R. 525 (1928).

**15-12-106. Validity of power of attorney.** — (1) A power of attorney executed in this state on or after the effective date of this chapter is valid if its execution complies with section 15-12-105, Idaho Code.

(2) A power of attorney executed in this state before the effective date of this chapter is valid if its execution complied with the law of this state as it existed at the time of execution.



(3) A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(a) The law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to section 15-12-107, Idaho Code; or

(b) The requirements for a military power of attorney pursuant to 10 U.S.C. section 1044b, as amended.

(4) Except as otherwise provided by statute other than this chapter, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original. [I.C., § 15-12-106, as added by 2008, ch. 186, § 2, p. 561.]

### STATUTORY NOTES

**Compiler's Notes.** — The term “effective date of this chapter”, used twice in this section, refers to the effective date of chapter 12,

title 15, Idaho Code, enacted by S.L. 2008, ch. 186, effective July 1, 2008.

### OFFICIAL COMMENT

One of the purposes of the Uniform Power of Attorney Act is promotion of the portability and use of powers of attorney. Section 106 [this section] makes clear that the Act does not affect the validity of pre-existing powers of attorney executed under prior law in the enacting jurisdiction, powers of attorney validly created under the law of another jurisdiction, and military powers of attorney. While the effect of this section is to recognize the validity of powers of attorney created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

This section also provides that unless another law in the jurisdiction requires presentation of the original power of attorney, a photocopy or electronically transmitted copy has the same effect as the original. An example of another law that might require presentation of the original power of attorney is the jurisdiction's recording act. *See, e.g.*, Restatement (Third) of Property (Wills & Don. Trans.) § 6.3 cmt. e (2003) (noting that in order to record a deed, “some states require that the document of transfer be signed, sealed, attested, and acknowledged”).

**15-12-107. Meaning and effect of power of attorney.** — The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed. [I.C., § 15-12-107, as added by 2008, ch. 186, § 2, p. 562.]

### OFFICIAL COMMENT

This section recognizes that a foreign power of attorney, or one executed before the effective date of the Uniform Power of Attorney Act, may have been created under different default rules than those in this Act. Section 107 [this section] provides that the meaning and effect of a power of attorney is to be determined by the law under which it was created. For example, the law in another jurisdiction may provide for different default rules with respect to durability of a power of

attorney (*see* Section 104 [§ 15-12-104]), the authority of coagents (*see* Section 111 [§ 15-12-111]) or the scope of specific authority such as the authority to make gifts (*see* Section 217 [§ 15-12-217]). Section 107 [this section] clarifies that the principal's intended grant of authority will be neither enlarged nor narrowed by virtue of the agent using the power in a different jurisdiction. For a discussion of the issues that can arise with inter-jurisdictional use of powers of attorney, *see* Linda S.

Whitton, *Crossing State Lines with Durable Powers*, Prob. & Prop., Sept./Oct. 2003, at 28.

This section also establishes an objective means for determining what jurisdiction's law the principal intended to govern the meaning and effect of a power of attorney. The phrase, "the law of the jurisdiction indicated in the power of attorney," is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal's choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction's power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 107 [this section] provides that the law of the

jurisdiction in which the power of attorney was executed controls. The distinction between "the law of the jurisdiction indicated in the power of attorney" and "the law of the jurisdiction in which the power of attorney was executed" is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction's law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney. *See, e.g.*, Section 301 [§ 15-12-301] (providing for the name of the jurisdiction to appear in the title of the statutory form power of attorney).

**15-12-108. Nomination of conservator; relation of agent to court-appointed fiduciary.** — (1) In a power of attorney, a principal may nominate a conservator of the principal's estate for consideration by the court if protective proceedings for the principal's estate are thereafter commenced.

(2) If, after a principal executes a power of attorney, a court appoints a conservator of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is not terminated and the agent's authority continues unless limited, suspended or terminated by the court. [I.C., § 15-12-108, as added by 2008, ch. 186, § 2, p. 562.]

#### OFFICIAL COMMENT

Section 108(b) [subsection (2)] is a departure from the Uniform Durable Power of Attorney Act which gave a court-appointed fiduciary the same power to revoke or amend a power of attorney as the principal would have if not incapacitated. *See* Unif. Durable Power of Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the principal's choice of agent by providing that the agent's authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent's authority. This approach assumes that the later-appointed fiduciary's authority should supplement, not truncate, the agent's authority. If, however, a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary. Section 108(b) [subsection (2)] is consistent with the state legislative trend that has departed from

the Uniform Durable Power of Attorney Act. *See, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-10 (1992); Ind. Code Ann. § 30-5-3-4 (1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (2001); N.J. Stat. Ann. § 46:2B-8.4 (2003); N.M. Stat. Ann. § 45-5-503A (2004); Utah Code Ann. § 75-5-501 (2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 108(b) is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which provides that a guardian may not revoke the ward's advance health-care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997), which provides that a guardian or conservator may not revoke the ward's or protected person's power of attorney for health-care or financial management without first obtaining express authority of the court. *See* Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), § 411(d) (protective proceedings).



Deference for the principal's autonomous choice is evident both in the presumption that an agent's authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal's most recent nomination (see subsection (a) [(1)]). Typically, a principal will nominate as conservator or guardian the same individual named as agent under the power of attorney. Favoring the principal's choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (see Unif. Guardianship & Protective Proc. Act

§ 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose of thwarting the agent's authority to gain control over a vulnerable principal. See Unif. Guardianship & Protective Proc. Act § 310 cmt. (1997). See also Linda S. Ershow-Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy*, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged<sup>o</sup> incapacitated person's constitutionally protected rights of privacy and association).

**15-12-109. When power of attorney effective.** — (1) A power of attorney is effective when executed unless the principal provides in the power of attorney that it is to become effective at a future date or upon the occurrence of a future event or contingency.

(2) If a power of attorney is to become effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one (1) or more persons to determine in a writing or other record that the event or contingency has occurred.

(3) If a power of attorney is to become effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(a) A physician or licensed psychologist that the principal is incapacitated within the meaning of section 15-12-102(5)(a), Idaho Code; or

(b) A licensed attorney at law, judge or appropriate governmental official that the principal is incapacitated within the meaning of section 15-12-102(5)(b), Idaho Code.

(4) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative as defined in, and pursuant to, the health insurance portability and accountability act, sections 1171 through 1179 of the social security act, 42 U.S.C. section 1320d through 1320d-8, as amended, and applicable regulations, to obtain access to the principal's health care information and communicate with the principal's health care provider. [I.C., § 15-12-109, as added by 2008, ch. 186, § 2, p. 562.]

### STATUTORY NOTES

**Federal References.** — The health insurance portability and accountability act, referred to in subsection (4), is P.L. 104-191, 110

Stat. 1936, which is codified in scattered sections in Title 42 of the United States Code.

### OFFICIAL COMMENT

This section establishes a default rule that a power of attorney is effective when executed. If the principal chooses to create what is commonly known as a "springing" or con-

tingent power of attorney—one that becomes effective at a future date or upon a future event or contingency—the principal may authorize the agent or someone else to provide



written verification that the event or contingency has occurred (subsection (b) [(2)]). Because the person authorized to verify the principal's incapacitation will likely need access to the principal's health information, subsection (d) [(4)] qualifies that person to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA). See 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must ... treat a personal representative as the individual"). Section 109 [this section] does not, however, empower the agent to make health-care decisions for the principal. See Section 103 [§ 15-12-103] and comment (discussing exclusion from this Act of powers to make health-care decisions).

The default rule reflects a "best practices" philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker. See Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws, 6-7 (2002), <http://www.law.upenn.edu/bll/lule/dpoa/surveyoct2002.htm> (reporting that 23%

of lawyer respondents found their clients preferred springing powers, 61% reported a preference for immediate powers, and 16% saw no trend; however, 89% stated that a power of attorney statute should authorize springing powers).

If the principal's incapacity is the trigger for a springing power of attorney and the principal has not authorized anyone to make that determination, or the authorized person is unable or unwilling to make the determination, this section provides a default mechanism to trigger the power. Incapacity based on the principal's impairment may be verified by a physician or licensed psychologist (subsection (c)(1) [(3)(a)]), and incapacity based on the principal's unavailability (*i.e.*, the principal is missing, detained, or unable to return to the United States) may be verified by an attorney at law, judge, or an appropriate governmental official (subsection (c)(2) [(3)(b)]). Examples of appropriate governmental officials who may be in a position to determine that the principal is incapacitated within the meaning of Section 102(5)(b) include an officer acting under authority of the United States Department of State or uniformed services of the United States or a sworn federal or state law enforcement officer. The default mechanism for triggering a power of attorney is available only when no incapacity determination has been made. It is not available to challenge the determination made by the principal's authorized designee.

### **15-12-110. Termination of power of attorney or agent's authority.**

— (1) A power of attorney terminates when:

- (a) The principal dies;
- (b) The principal becomes incapacitated, if the power of attorney is not durable;
- (c) The principal revokes the power of attorney;
- (d) The power of attorney provides it terminates;
- (e) The purpose of the power of attorney is accomplished; or
- (f) The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(2) An agent's authority terminates when:

- (a) The principal revokes the agent's authority;
- (b) The agent dies, becomes incapacitated or resigns;
- (c) An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or
- (d) The power of attorney terminates.

(3) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the power of attorney terminates, notwithstanding a lapse of time since the execution of the power of attorney.

(4) Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(5) Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(6) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked. [I.C., § 15-12-110, as added by 2008, ch. 186, § 2, p. 563.]

### OFFICIAL COMMENT

This section addresses termination of a power of attorney or an agent's authority under a power of attorney. It first lists termination events (*see* subsections (a) and (b) [(1) and (2)]), and then lists circumstances that, in contrast, either do not invalidate the power of attorney (*see* subsections (c) and (f) [(3) and (6)]) or the actions taken pursuant to the power of attorney (*see* subsections (d) and (e) [(4) and (5)]).

Subsection (c) [(3)] provides that a power of attorney under the Act does not become "stale." Unless a power of attorney provides for termination upon a certain date or after the passage of a period of time, lapse of time since execution is irrelevant to validity, a concept carried over from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power of Atty. Act § 1 (as amended in 1987). Similarly, subsection (f) [(6)] clarifies that a subsequently executed power of attorney will not revoke a prior power of attorney by virtue of inconsistency alone. To effect a revocation, a subsequently executed power of attorney must expressly revoke a previously executed power of attorney or state that all other powers of attorney are revoked. The requirement of express revocation prevents inadvertent revocation when the principal intends for one agent to have limited authority that overlaps with broader authority held by another agent. For example, the principal who has given one agent a very broad power of attorney, including general authority with respect to real property, may later wish to give another agent limited authority to execute closing documents with respect to out-of-town real estate.

Subsections (d) and (e) [(4) and (5)] empha-

size that even a termination event is not effective as to the agent or person who, without actual knowledge of the termination event, acts in good faith under the power of attorney. For example, the principal's death terminates a power of attorney (*see* subsection (a)(1) [(1)(a)]), but an agent who acts in good faith under a power of attorney without actual knowledge of the principal's death will bind the principal's successors in interest with that action (*see* subsection (d) [(4)]). The same result is true if the agent knows of the principal's death, but the person who accepts the agent's apparent authority has no actual knowledge of the principal's death. *See* Restatement (Third) of Agency § 3.11 (2006) (stating that "termination of actual authority does not by itself end any apparent authority held by an agent"). *See also* Section 119(c) [§ 15-12-119(3)] (stating that "[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is ... terminated ... may rely upon the power of attorney as if the power of attorney were ... still in effect ..."). These concepts are also carried forward from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power Atty. Act § 4 (1987).

Of special note in the list of termination events is subsection (b)(3) [(2)(c)] which provides that a spouse-agent's authority is revoked when an action is filed for the dissolution or annulment of the agent's marriage to the principal, or their legal separation. Although the filing of an action for dissolution or annulment might render a principal particularly vulnerable to self-interested actions by a spouse-agent, subsection (b)(3) [(2)(c)] is not mandatory and may be overridden in the



power of attorney. There may be special circumstances precipitating the dissolution, such as catastrophic illness and the need for public benefits, that would prompt the princi-

pal to specify that the agent's authority continues notwithstanding dissolution, annulment or legal separation.

**15-12-111. Coagents and successor agents.** — (1) A principal may designate two (2) or more persons to act as coagents. Unless a power of attorney otherwise provides, each coagent may exercise its authority independently.

(2) A principal may designate one (1) or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve, including a successor coagent. A principal may grant to an agent or other person designated by name, office or function, authority to designate one (1) or more successor agents, including a successor coagent. Unless a power of attorney otherwise provides, a successor agent:

(a) Has the same authority as that granted to the original agent; and

(b) May not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

(3) Except as otherwise provided in the power of attorney and subsection (4) of this section, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

(4) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action. [I.C., § 15-12-111, as added by 2008, ch. 186, § 2, p. 563.]

#### OFFICIAL COMMENT

This section provides several default rules that merit careful consideration by the principal. Subsection (a) [(1)] states that if a principal names coagents, each coagent may exercise its authority independently unless otherwise directed in the power of attorney. The Act adopts this default position to discourage the practice of executing separate, co-extensive powers of attorney in favor of different agents, and to facilitate transactions with persons who are reluctant to accept a power of attorney from only one of two or more named agents. This default rule should not, however, be interpreted as encouraging the practice of naming coagents. For a principal who can still monitor the activities of an agent, naming coagents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions will be taken with the principal's property. For the incapacitated principal, the risk is even greater that coagents will use the power of

attorney to vie for control of the principal and the principal's property. Although the principal can override the default rule by requiring coagents to act by majority or unanimous consensus, such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity. A more prudent practice is generally to name one original agent and one or more successor agents. If desirable, a principal may give the original agent authority to delegate the agent's authority during periods when the agent is temporarily unavailable to serve (see Section 201(a)(5) [§ 15-12-201(1)(e)]).

Subsection (b) [(2)] states that unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. While this default provision ensures that the scope of authority granted to the original agent can be carried forward by successors, a principal



may want to consider whether a successor agent is an appropriate person to exercise all of the authority given to the original agent. For example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations (see Section 201(a) [§ 15-12-201(1)]) may be appropriate for a spouse-agent, but not for an adult child who is named as the successor agent.

Subsection (c) [(3)] provides a default rule that an agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of fiduciary duty committed by that other agent. Consequently, absent specification to the contrary in the

power of attorney, an agent has no duty to monitor another agent's conduct. However, subsection (d) [(4)] does require that an agent that has actual knowledge of a breach or imminent breach of fiduciary duty must notify the principal, and if the principal is incapacitated, take reasonably appropriate action to safeguard the principal's best interest. Subsection (d) [(4)] provides that if an agent fails to notify the principal or to take action to safeguard the principal's best interest, that agent is only liable for the reasonably foreseeable damages that could have been avoided had the agent provided the required notification.

**15-12-112. Reimbursement and compensation of agent.** — Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances. [I.C., § 15-12-112, as added by 2008, ch. 186, § 2, p. 564.]

#### OFFICIAL COMMENT

This section provides a default rule that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to reasonable compensation. While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal's circumstances may warrant including limitations in the power of attorney as to the categories of expenses the agent may incur; likewise, the principal may choose to

specify the terms of compensation rather than leave that determination to a reasonableness standard. Although many family-member agents serve without compensation, payment of compensation to the agent may be advantageous to the principal in circumstances where the principal needs to spend down income or resources to meet qualifications for public benefits.

**15-12-113. Agent's acceptance.** — Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance. [I.C., § 15-12-113, as added by 2008, ch. 186, § 2, p. 564.]

#### OFFICIAL COMMENT

This section establishes a default rule for agent acceptance of appointment under a power of attorney. Unless a different method is provided in the power of attorney, an agent's acceptance occurs upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance. Acceptance is the critical reference point for commencement of the agency relationship and the imposition of fiduciary duties (see Section 114(a) [§ 15-12-114(1)]). Because a person may be unaware that the principal has designated the person as an agent in a power of attorney, clear demarcation of when an

agency relationship commences is necessary to protect both the principal and the agent. See Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 41 (2001) (noting that "fiduciary duties should be imposed only to the extent the attorney-in-fact knows of the role, is able to accept responsibility, and affirmatively accepts"). The Act also provides a default method for agent resignation (see Section 118 [§ 15-12-118]), which terminates the agency relationship (see Section 110(b)(2) [§ 15-12-110(2)(b)]).

**15-12-114. Agent's duties.** — (1) Notwithstanding provisions in a power of attorney, an agent that has accepted appointment shall:

- (a) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
  - (b) Act in good faith; and
  - (c) Act only within the scope of authority granted in the power of attorney.
- (2) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

- (a) Act loyally for the principal's benefit;
- (b) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- (c) Act with the care, competence and diligence ordinarily exercised by agents in similar circumstances;
- (d) Keep a record of all receipts, disbursements and transactions made on behalf of the principal;
- (e) Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
- (f) Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

- (i) The value and nature of the principal's property;
- (ii) The principal's foreseeable obligations and need for maintenance;
- (iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes; and
- (iv) Eligibility for a benefit, a program or assistance under a statute or governmental regulation.

(3) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(4) An agent that acts with care, competence and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(5) If an agent is selected by the principal because of special skills or expertise possessed by the agent, or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence and diligence under the circumstances.

(6) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(7) An agent that exercises authority to delegate to another person the authority granted by the principal or that employs another person on behalf of the principal is not liable for an act, error of judgment or default of that person if the agent exercises care, competence and diligence in selecting and monitoring the person.

(8) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements or transactions conducted on



behalf of the principal unless ordered by a court or requested by the principal, a guardian, conservator, other fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, the agent shall comply with the request within thirty (30) days or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty (30) days. [I.C., § 15-12-114, as added by 2008, ch. 186, § 2, p. 564.]

### OFFICIAL COMMENT

Although well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney statutes about what that means. *See generally* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1 (2001); Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574 (1996). Among states that address agent duties, the standard of care varies widely and ranges from a due care standard (*see, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-7 (1992); Ind. Code Ann. § 30-5-6-2 (1994)) to a trustee-type standard (*see, e.g.*, Fla. Stat. Ann. § 709.08(8) (2006); Mo. Ann. Stat. § 404.714 (2001)). Section 114 [this section] clarifies agent duties by articulating minimum mandatory duties (subsection (a) [(1)]) as well as default duties that can be modified or omitted by the principal (subsection (b) [(2)]).

The mandatory duties — acting in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest; acting in good faith; and acting only within the scope of authority granted — may not be altered in the power of attorney. Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for “substituted judgment” over “best interest” as the surrogate decision-making standard that better protects an incapacitated person's self-determination interests. *See Wingspan — The Second National Guardianship Conference, Recommendations*, 31 Stetson L. Rev. 595, 603 (2002). *See also* Unif. Guardianship & Protective Proc. Act § 314(a) (1997).

The Act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney. In fact, one of the advantages of a power of attorney over a trust or guardianship is the flexibility and informality with which an agent may exercise authority and respond to changing circumstances. However, when a

principal's subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expectations in a written and admissible form as a precaution against later challenges to the agent's conduct (*see* Section 116 [§ 15-12-116]).

If a principal's expectations potentially conflict with a default duty under the Act, then stating the expectations in the power of attorney, or altering the default rule to accommodate the expectations, or both, is advisable. For example, a principal may want to invest in a business owned by a family member who is also the agent in order to improve the economic position of the agent and the agent's family. Without the principal's clear expression of this objective, investment by the agent of the principal's property in the agent's business may be viewed as breaching the default duty to act loyally for the principal's benefit (subsection (b)(1) [(2)(a)]) or the default duty to avoid conflicts of interest that impair the agent's ability to act impartially for the principal's best interest (subsection (b)(2) [(2)(b)]).

Two default duties in this section protect the principal's previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal (subsection (b)(5) [(2)(e)]) and the duty to preserve the principal's estate plan (subsection (b)(6) [(2)(f)]). However, an agent has a duty to preserve the principal's estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal's best interest. Factors relevant to determining whether preservation of the estate plan is in the principal's best interest include the value of the principal's property, the principal's need for maintenance, minimization of taxes, and eligibility for public benefits. The Act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (c) [(3)]).

Subsection (d) [(4)] provides that an agent acting with care, competence, and diligence



for the best interest of the principal is not liable solely because the agent also benefits from the act or has a conflict of interest. This position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the principal. *See* Restatement (Second) of Agency § 387 (1958); *see also* Unif. Trust Code § 802(a) (2003) (requiring a trustee to administer a trust “solely in the interests” of the beneficiary). Subsection (d) [(4)] is modeled after state statutes which provide that loyalty to the principal can be compatible with an incidental benefit to the agent. *See* Cal. Prob. Code § 4232(b) (2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (1992); Ind. Code Ann. § 30-5-9-2 (2005). The Restatement (Third) of Agency § 8.01 (2006) also contemplates that loyal service to the principal may be concurrently beneficial to the agent (*see* Reporter’s note a). *See also* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 943 (2005) (arguing that the sole interest test for loyalty should be replaced by the best interest test). The public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.

Subsection (e) [(5)] provides additional protection for a principal who has selected an agent with special skills or expertise by requiring that such skills or expertise be considered when evaluating the agent’s conduct. If a principal chooses to appoint a family member or close friend to serve as an agent, but does not intend that agent to serve under a higher standard because of special skills or expertise, the principal should consider including an exoneration provision within the power of attorney (*see* comment to Section 115 [§ 15-12-115]).

Subsections (f) and (g) [(6) and (7)] state protections for an agent that are similar in scope to those applicable to a trustee. Subsection (f) [(6)] holds an agent harmless for decline in the value of the principal’s property absent a breach of fiduciary duty (*cf.* Unif. Trust Code § 1003(b) (2003)). Subsection (g) [(7)] holds an agent harmless for the conduct

of a person to whom the agent has delegated authority, or who has been engaged by the agent on the principal’s behalf, provided the agent has exercised care, competence, and diligence in selecting and monitoring the person (*cf.* Unif. Trust Code § 807(c) (2003)).

Subsection (h) [(8)] codifies the agent’s common law duty to account to a principal (*see* Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) [(8)] states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal’s personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) [(2)(d)] does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal’s fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. *See* 755 Ill. Comp. Stat. Ann. 45/2-7.5 (2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). *See generally* Donna J. Rabiner, David Brown & Janet O’Keeffe, *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective counter-measure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent’s conduct. *See* Section 116 [§ 15-12-116] and Comment.

**15-12-115. Exoneration of agent.** — A provision in a power of attorney relieving the agent of liability for breach of duty is binding on the principal and the principal’s successors in interest except to the extent the provision:

(1) Relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal. [I.C., § 15-12-115, as added by 2008, ch. 186, § 2, p. 565.]

#### OFFICIAL COMMENT

This section permits a principal to exonerate an agent from liability for breach of fiduciary duty, but prohibits exoneration for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. The mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees. A trustee's failure to adhere to that standard cannot be excused by language in the trust instrument. *See* Unif. Trust Code § 1008 cmt. (2003) (noting that "a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries"). *See also* Section 102(4) [§ 15-12-102(d)] (defining good

faith for purposes of the Act as "honesty in fact"). Section 115 [this section] provides, as an additional measure of protection for the principal, that an exoneration provision is not binding if it was inserted as the result of abuse of a confidential or fiduciary relationship with the principal. While as a matter of good practice an exoneration provision should be the exception rather than the rule, its inclusion in a power of attorney may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent's conduct in order to gain control of the principal's assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.

**15-12-116. Judicial relief.** — (1) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

- (a) The principal or the agent;
- (b) A guardian, conservator or other fiduciary acting for the principal;
- (c) A person authorized to make health care decisions for the principal;
- (d) The principal's spouse, parent or descendant;
- (e) An individual who would qualify as a presumptive heir of the principal;
- (f) A person named as a beneficiary to receive any property, benefit or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
- (g) A governmental agency having regulatory authority to protect the welfare of the principal;
- (h) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
- (i) A person asked to accept the power of attorney.

(2) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

(3) The court may award reasonable attorney's fees and costs to the prevailing party in a proceeding under this section. [I.C., § 15-12-116, as added by 2008, ch. 186, § 2, p. 565.]

#### OFFICIAL COMMENT

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) [(1)]

sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of



the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (a)(8) [(1)(h)]). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions. *See* Cal. Prob. Code § 4540 (2006); Colo. Rev. Stat. Ann. § 15-14-609 (2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (1992); Ind. Code Ann. § 30-5-3-5 (1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (2001); N.H. Rev. Stat. Ann. § 506:7 (2005); Wash. Rev. Code Ann. § 11.94.100 (2006); Wis. Stat. Ann. § 243.07(6r) (2001). *But cf.* 20 Pa. Cons. Stat. Ann. § 5604 (2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

In addition to providing a means for detect-

ing and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (b) [(2)] states that the court must dismiss a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney. Contrasted with the breadth of Section 116 [this section] is Section 114(h) [§ 15-12-114(8)] which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial privacy. *See* Section 114 [§ 15-12-114] Comment. Section 116 [this section] operates as a check-and-balance on the narrow scope of Section 114(h) [§ 15-12-114(8)] and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

**15-12-117. Agent's liability.** — An agent that violates this chapter is liable to the principal or the principal's successors in interest for the amount required to:

- (1) Restore the value of the principal's property to what it would have been had the violation not occurred; and
- (2) Reimburse the principal or the principal's successors in interest for the attorney's fees and costs, and other professional fees and costs, paid on the agent's behalf. [I.C., § 15-12-117, as added by 2008, ch. 186, § 2, p. 566.]

#### OFFICIAL COMMENT

This section provides that an agent's liability for violating the Act includes not only the amount necessary to restore the principal's property to what it would have been had the violation not occurred, but also any amounts for attorney's fees and costs advanced from the principal's property on the agent's behalf. This section does not, however, limit the agent's liability exposure to these amounts.

Pursuant to Section 123 [§ 15-12-123], remedies under the Act are not exclusive. If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, *see* Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 McGeorge L. Rev. 267 (2003).

**15-12-118. Agent's resignation — Notice.** — If a power of attorney does not provide the method for an agent's resignation, an agent may resign by giving written notice to the principal and, if the principal is incapacitated:

- (1) To the conservator or guardian, if one (1) has been appointed for the principal, and a coagent or successor agent; or
- (2) If there is no person described in subsection (1) of this section, to:
  - (a) The principal's caregiver;
  - (b) Another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or
  - (c) A governmental agency having authority to protect the welfare of the principal. [I.C., § 15-12-118, as added by 2008, ch. 186, § 2, p. 566.]



## OFFICIAL COMMENT

Section 118 [this section] provides a default procedure for an agent's resignation. An agent who no longer wishes to serve should formally resign in order to establish a clear demarcation of the end of the agent's authority and to minimize gaps in fiduciary responsibility before a successor accepts the office. If the principal still has capacity when the agent wishes to resign, this section requires only that the agent give notice to the principal. If, however, the principal is incapacitated, the agent must, in addition to giving notice to the principal, give notice as set forth in paragraphs (1) or (2).

Paragraph (1) provides that notice must be given to a fiduciary, if one has been appointed, and to a coagent or successor agent, if any. If the principal does not have an appointed

fiduciary and no coagent or successor agent is named in the power of attorney, then the agent may choose among the notice options in paragraph (2). Paragraph (2) permits the resigning agent to give notice to the principal's caregiver, a person reasonably believed to have sufficient interest in the principal's welfare, or a governmental agency having authority to protect the welfare of the principal. The choice among these options is intentionally left to the agent's discretion and is governed by the same standards as apply to other agent conduct. *See* Section 114(a) [§ 15-12-114(1)] (requiring the agent to act in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest).

**15-12-119. Acceptance of and reliance upon an acknowledged power of attorney.** — (1) For purposes of this section and section 15-12-120, Idaho Code, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgments.

(2) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under section 15-12-105, Idaho Code, that the signature is genuine.

(3) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid or terminated, that the purported agent's authority is void, invalid or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority.

(4) A person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation:

(a) An agent's certification under penalty of perjury of any factual matter concerning the principal, the agent or the power of attorney;

(b) An English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and

(c) An opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

(5) An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made more than seven (7) business days after the power of attorney is presented for acceptance.

(6) For purposes of this section and section 15-12-120, Idaho Code, a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal or an agent if the

employee conducting the transaction involving the power of attorney is without actual knowledge of the fact. [I.C., § 15-12-119, as added by 2008, ch. 186, § 2, p. 566.]

#### OFFICIAL COMMENT

This section protects persons who in good faith accept an acknowledged power of attorney. Section 119 [this section] does not apply to unacknowledged powers of attorney. See Section 105 [§ 15-12-105] (providing that the signature on a power of attorney is presumed genuine if acknowledged). Subsection (a) [(1)] states that for purposes of this section and Section 120 [§ 15-12-120] “acknowledged” means “purportedly” verified before an individual authorized to take acknowledgments. The purpose of this definition is to protect a person that in good faith accepts an acknowledged power of attorney without knowledge that it contains a forged signature or a latent defect in the acknowledgment. See, e.g., Cal. Prob. Code § 4303(a)(2) (2006); 755 Ill. Comp. Stat. Ann. 45/2-8 (2006); Ind. Code Ann. § 30-5-8-2 (1994); N.C. Gen. Stat. § 32A-40 (2005). The Act places the risk that a power of attorney is invalid upon the principal rather than the person that accepts the power of attorney. This approach promotes acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship. The national survey conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (see Prefatory Note) found that a majority of respondents had difficulty obtaining acceptance of powers of attorney. Sixty-three percent reported occasional difficulty and sev-

enteen percent reported frequent difficulty. Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws 12-13 (2002), available at <http://www.law.upenn.edu/bll/lulcldpaa/surveyoct2002.htm>.

Section 119 [this section] permits a person to rely in good faith on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the agent's exercise of authority, unless the person has actual knowledge to the contrary (subsection (c) [(3)] ). Although a person is not required to investigate whether a power of attorney is valid or the agent's exercise of authority proper, subsection (d) [(4)] permits a person to request an agent's certification of any factual matter (see Section 302 [§ 15-12-302] for a sample certification form) and an opinion of counsel as to any matter of law. If the power of attorney contains, in whole or part, language other than English, an English translation may also be requested. Further protection is provided in subsection (f) [(6)] for persons that conduct activities through employees. Subsection (f) [(6)] states that for purposes of Sections 119 [this section] and 120 [§ 15-12-120], a person is without actual knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.

**15-12-120. Liability for refusal to accept an acknowledged power of attorney.** — (1) Except as otherwise provided in subsection (2) of this section:

(a) A person must either accept an acknowledged power of attorney or request an agent's certification, a translation or an opinion of counsel pursuant to section 15-12-119(4), Idaho Code, within seven (7) business days after presentation of the power of attorney for acceptance;

(b) If a person requests an agent's certification, a translation, or an opinion of counsel under section 15-12-119(4), Idaho Code, the person must accept the power of attorney no later than five (5) business days after receipt of the certification, translation or opinion of counsel; and

(c) A person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(2) A person is not required to accept an acknowledged power of attorney if:

(a) The person is not otherwise required to engage in a transaction with the principal in the same circumstances;



- (b) Engaging in a transaction with the agent or the principal in the same circumstances would not be consistent with federal law;
- (c) The person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;
- (d) A request for a certification, a translation, or an opinion of counsel under section 15-12-119(4), Idaho Code, is refused;
- (e) The person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not an agent's certification, a translation or an opinion of counsel has been requested or provided; or
- (f) The person makes, or has actual knowledge that another person has made, a report to the local adult protective services office stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or a person acting for or with the agent.

(3) A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:

- (a) A court order mandating acceptance of the power of attorney; and
- (b) Liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney. [I.C., § 15-12-120, as added by 2008, ch. 186, § 2, p. 567.]

#### OFFICIAL COMMENT

As a complement to Section 119 [§ 15-12-119], Section 120 [this section] enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 119 [§ 15-12-119], Section 120 [this section] does not apply to unacknowledged powers of attorney. Enacting jurisdictions are provided a choice between alternative Sections 120 [this section]. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney. [Idaho has adopted Alternative A.]

Subsection (b) [(2)] of Alternative A provides the bases upon which an acknowledged power of attorney may be refused without liability. The last paragraph of subsection (b) [(2)] permits refusal of an otherwise valid acknowledged power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (6) [(f)]). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. See 20 Pa. Cons. Stat. Ann. § 5608(a) (2005).

Unless a basis exists in subsection (b) [(2)] for refusing an acknowledged power of attorney, subsection (a) [(1)] requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 119 [§ 15-12-119]. If a request under Section 119 [§ 15-12-119] is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (a)(2) [(1)(b)]). Provided no basis exists for refusing the power of attorney, subsection (a)(3) [(1)(c)] prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (c) [(3)] of Alternative A provides that a person that refuses an acknowledged power of attorney in violation of Section 120 [this section] is subject to a court order mandating acceptance and to reasonable attorney's fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for unreasonable refusal of a power of attorney is based on a growing state legislative trend. See, e.g., Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (2006); Fla. Stat. Ann. § 709.08(11) (2006); 755 Ill. Comp.



Stat. Ann. 45/2-8 (1992); Ind. Code Ann. § 30-5-9-9 (2005); Minn. Stat. Ann. § 523.20 (2006); N.Y. Gen. Oblg. Law § 5-1504 (2001);

N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (2005); S.C. Code Ann. § 62-5-501(F)(1) (2005).

**15-12-121. Principles of law and equity.** — Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter. [I.C., § 15-12-121, as added by 2008, ch. 186, § 2, p. 568.]

#### OFFICIAL COMMENT

The Act is supplemented by common law, including the common law of agency, where provisions of the Act do not displace relevant common law principles. The common law of agency is articulated in the Restatement of Agency and includes contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. The common law also includes the traditional and broad equitable jurisdiction of the court, which this Act in no way restricts.

The statutory text of the Uniform Power of Attorney Act is also supplemented by these comments, which, like the comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2B Norman Singer, *Southerland Statutory Construction* § 52.5 (6th ed. 2000).

**15-12-122. Laws applicable to financial institutions and entities.** — This chapter does not supersede any law applicable to financial institutions or other entities, and the other law controls if inconsistent with this chapter. [I.C., § 15-12-122, as added by 2008, ch. 186, § 2, p. 568.]

#### OFFICIAL COMMENT

This section addresses concerns of representatives from the banking and insurance industries that there may be regulations which govern those entities that conflict with provisions of this Act. Although no specific conflicts were identified during the drafting process, Section 122 [this section] provides that in the event a law applicable to a financial institution or other entity is inconsistent with this Act, the other law will supersede this Act to the extent of the inconsistency.

This concern about inconsistency with the requirements of other law is already substantially addressed in Section 120 [§ 15-12-120], which provides, in pertinent part, that a person is not required to accept a power of attorney if, “the person is not otherwise required to engage in a transaction with the principal in the same circumstances,” or “engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law.”

**15-12-123. Remedies under other law.** — The remedies under this chapter are not exclusive and do not abrogate any right or remedy under the law of this state. [I.C., § 15-12-123, as added by 2008, ch. 186, § 2, p. 568.]

#### OFFICIAL COMMENT

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a power of attorney. The Act applies to many persons, individual and entity (see Section 102(6) [§ 15-12-102(6)] (defining “person” for purposes of the Act)), that may serve as agents or that may be asked to accept a power

of attorney. Likewise, the Act applies to many subject areas (*see* Article 2) over which principals may delegate authority to agents. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act. *See, e.g.*, Section 117 [§ 15-12-117] Comment.

## PART 2. AUTHORITY

**15-12-201. Authority that requires specific grant — Grant of general authority.** — (1) An agent under a power of attorney may exercise the following authority on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise is not otherwise prohibited by other agreement or instrument to which the authority or property is subject:

- (a) Create, amend, revoke or terminate an inter vivos trust;
- (b) Make a gift;
- (c) Create or change rights of survivorship;
- (d) Create or change a beneficiary designation;
- (e) Delegate authority granted under the power of attorney;
- (f) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- (g) Exercise fiduciary powers that the principal has authority to delegate.

(2) Notwithstanding a grant of authority to exercise authority in subsection (1) of this section, unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse or descendant of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer or otherwise.

(3) Subject to subsections (1), (2), (4) and (5) of this section, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in sections 15-12-204 through 15-12-216, Idaho Code.

(4) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to section 15-12-217, Idaho Code.

(5) Subject to subsections (1), (2) and (4) of this section, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(6) Authority granted in a power of attorney is exercisable with respect to a property interest that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(7) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act. [I.C., § 15-12-201, as added by 2008, ch. 186, § 2, p. 568.]

## OFFICIAL COMMENT

Article 2 is based in part on the predecessor Uniform Statutory Form Power of Attorney Act, approved in 1988. It provides the default statutory construction for authority granted in a power of attorney. Sections 204 through 217 [§§ 15-12-204 through 15-12-217] de-

scribe authority with respect to various subject matters. These descriptions may be incorporated by reference in the optional statutory form (Section 301 [§ 15-12-301]) or in an individually drafted power of attorney. Incorporation is accomplished either by referring



to the descriptive term for the subject or by providing a citation to the section in which the authority is described (Section 202 [§ 15-12-202]). A principal may also modify any authority incorporated by reference (Section 202(c) [§ 15-12-202(3)]). Section 203 [§ 15-12-203] supplements Sections 204 through 217 [§§ 15-12-204 through 15-12-217] by providing general terms of construction that apply to all grants of authority under those sections unless otherwise indicated in the power of attorney.

Most of the language in Sections 204 through 216 [§§ 15-12-204 through 15-12-216] of Article 2 comes directly from the Uniform Statutory Form Power of Attorney Act. The language has been revised where necessary to reflect modern custom and practice. Where significant changes have been made, they are noted in a comment to the relevant section. In general, there are two important differences between the statutory treatment of authority in this Act and in the Uniform Statutory Form Power of Attorney Act. First, this Act includes a section that provides a default rule for the parameters of gift making authority (Section 217 [§ 15-12-217]). Second, this Act identifies specific acts that may be authorized only by an express grant in the power of attorney (Section 201(a) [§ 15-12-201(1)]). Express authorization for the acts listed in Section 201(a) [§ 15-12-201(1)] is required because of the risk those acts pose to the principal's property and estate plan. The purpose of Section 201(a) [§ 15-12-201(1)] is to make clear that authority for these acts may not be inferred from a grant of general authority.

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 201(a) [(1)] enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations. *See, e.g.,* Cal. Prob. Code § 4264 (2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (2001); Wash. Rev. Code Ann. § 11.94.050 (2006). The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) [(1)] is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advise before granting authority to an agent.

The Act does not contain statutory construction language for any of the acts enumerated in subsection (a) [(1)] other than the making of gifts (*see* Section 217 [§ 15-12-217]). Because a gift of the principal's property reduces the principal's estate, the Act, like a number of state statutes, sets default per-donee limits on gift amounts. *See, e.g.,* N.Y. Gen. Oblig. Law § 5-1502M (2001); 20 Pa. Cons. Stat. Ann. § 5603(a)(2)(ii) (2005). However, as with any authority incorporated by reference in a power of attorney, the principal may enlarge or restrict the default parameters set by the Act.

With respect to other acts listed in Section 201(a) [(1)], the Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted. For example, if a principal grants authority to create or change rights of survivorship (subsection (a)(3) [(1)(c)]) or beneficiary designations (subsection (a)(4) [(1)(d)]) the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts. Principals should carefully consider not only whether to authorize any of the acts listed in Section 201(a) [(1)], but also whether to limit the scope of such actions.

Subsection (b) [(2)] contains an additional safeguard for the principal. It establishes as a default rule that an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent or in an individual the agent is legally obligated to support, an interest in the principal's property. For example, a non-relative agent with gift making authority could not make a gift to the agent or a dependant of the agent without the principal's express authority in the power of attorney. In contrast, a spouse-agent with express gift-making authority could implement the principal's expectation that annual family gifts be continued without additional authority in the power of attorney.

Notwithstanding a grant of authority to perform any of the enumerated acts in subsection (a) [(1)], an agent is bound by the mandatory fiduciary duties set forth in Section 114(a) [§ 15-12-114(1)] as well as the default duties that the principal has not modified. For a list of these default rules, *see* Section 301 [§ 15-12-301] Comment. If the principal's expectations for the performance of authorized acts potentially conflict with those duties, then clarification of the principal's expectations, modification of the default duties, or both, may be advisable. *See* Section 114 [§ 15-12-114] Comment.

Authority for acts and subject matters other than those listed in Section 201(a) [(1)] may be granted either through incorporation by reference (*see* Section 202) [§ 15-12-202]



or, if the principal wishes to grant comprehensive general authority, by a grant of authority to do all the acts that a principal could do. A broad grant of general authority is inter-

preted under the Act as including all of the subject matters and authority described in Sections 204 through 216 [§§ 15-12-204 through 15-12-216] (see subsection (c) [(3)]).

**15-12-202. Incorporation of authority.** — (1) An agent has authority described in this part if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in sections 15-12-204 through 15-12-217, Idaho Code, or cites the section in which the authority is described.

(2) A reference in a power of attorney to general authority with respect to the descriptive term for a subject in sections 15-12-204 through 15-12-217, Idaho Code, or a citation to sections 15-12-204 through 15-12-217, Idaho Code, incorporates the entire section as if it were set out in full in the power of attorney.

(3) A principal may modify authority incorporated by reference. [I.C., § 15-12-202, as added by 2008, ch. 186, § 2, p. 569.]

#### OFFICIAL COMMENT

This section provides two methods for incorporating into a power of attorney the Act's statutory construction for authority over various subject matters. A reference in a power of attorney to the descriptive term for a subject in Sections 204 through 217 [§§ 15-12-204 through 15-12-217], or to the section number, incorporates the entire statutory section as if it were set out in full in the power of attorney. Subsection (c) [(3)] provides that a principal

may modify any authority incorporated by reference. The optional statutory form power of attorney provided in Section 301 [§ 15-12-301] uses the descriptive terms in Sections 204 through 217 [§§ 15-12-204 through 15-12-217] to incorporate statutory construction for authority granted on the form and provides a "Special Instructions" section where the principal may modify any authority incorporated by reference.

**15-12-203. Construction of authority generally.** — Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in sections 15-12-204 through 15-12-217, Idaho Code, or that grants to an agent authority to do all acts that a principal could do pursuant to section 15-12-201(3), Idaho Code, a principal authorizes the agent, with respect to that subject, to:

(1) Demand, receive and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received for the purposes intended;

(2) Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release or modify the contract or another contract made by or on behalf of the principal;

(3) Execute, acknowledge, seal, deliver, file or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

(4) Prosecute, defend, submit to alternative dispute resolution, settle and propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(5) Seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

(6) Engage, compensate and discharge an attorney, accountant, discretionary investment manager, expert witness or other assistant;

(7) Prepare, execute and file a record, report or other document to safeguard or promote the principal's interest under a statute or governmental regulation;

(8) Communicate with any representative or employee of a government, governmental subdivision, agency or instrumentality on behalf of the principal;

(9) Access communications intended for and communicate on behalf of the principal, whether by mail, electronic transmission, telephone or other means; and

(10) In general, do any other lawful act with respect to the subject and all property related to the subject. [I.C., § 15-12-203, as added by 2008, ch. 186, § 2, p. 569.]

#### OFFICIAL COMMENT

This section is based on Section 3 of the Uniform Statutory Form Power of Attorney Act. It describes incidental types of authority that accompany all authority granted to an agent under each of Sections 204 through 217 [§§ 15-12-204 through 15-12-217], unless this incidental authority is modified in the power of attorney. The actions authorized in Section 203 [§ 15-12-203] are of the type often necessary for the exercise or implementation of authority over the subjects described in Sections 204 through 217 [§§ 15-12-204 through 15-12-217]. See Unif. Statutory Form Power of Atty. Act prefatory note (1988). Paragraph

(10), which states that an agent is authorized to "do any [other] lawful act with respect to the subject and all property related to the subject," emphasizes that a grant of general authority is intended to be comprehensive unless otherwise limited by the Act or the power of attorney. Paragraphs (8) and (9) were added to the section to clarify that this comprehensive authority includes authorization to communicate with government employees on behalf of the principal, to access communications intended for the principal, and to communicate on behalf of the principal using all modern means of communication.

**15-12-204. Real property.** — Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

(1) Demand, buy, lease, receive, accept as a gift or as security for an extension of credit or otherwise acquire or reject an interest in real property or a right incident to real property;

(2) Sell; exchange; convey with or without covenants, representations or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning, rezoning or other governmental permits; plat or consent to platting; develop; grant options concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(3) Pledge or mortgage an interest in real property or right incident to real property as security in order to borrow money or pay, renew or extend

the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) Release, assign, satisfy or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien or other claim to real property which exists or is asserted;

(5) Manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(a) Insuring against liability, or casualty or other loss;

(b) Obtaining or regaining possession or protecting the interest or right by litigation or otherwise;

(c) Paying, assessing, compromising or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

(d) Purchasing supplies, hiring assistance or labor and making repairs or alterations to the real property;

(6) Use, develop, alter, replace, remove, erect or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(7) Participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive and hold stocks and bonds or other property received in a plan of reorganization, and act with respect to them, including:

(a) Selling or otherwise disposing of them;

(b) Exercising or selling an option, conversion, or similar right with respect to them; and

(c) Exercising any voting rights in person or by proxy;

(8) Change the form of title of an interest in or right incident to real property; and

(9) Dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest. [I.C., § 15-12-204, as added by 2008, ch. 186, § 2, p. 570.]

**15-12-205. Tangible personal property.** — Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

(1) Demand, buy, receive, accept as a gift or as security for an extension of credit or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(2) Sell; exchange; convey with or without covenants, representations or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or otherwise dispose of tangible personal property or an interest in tangible personal property;

(3) Grant a security interest in tangible personal property or an interest in tangible personal property as security in order to borrow money or pay, renew or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) Release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;



(5) Manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

- (a) Insuring against liability, or casualty or other loss;
- (b) Obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;
- (c) Paying, assessing, compromising or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;
- (d) Moving the property from place to place;
- (e) Storing the property for hire or on a gratuitous bailment; and
- (f) Using and making repairs, alterations or improvements to the property; and

(6) Change the form of title of an interest in tangible personal property. [I.C., § 15-12-205, as added by 2008, ch. 186, § 2, p. 571.]

**15-12-206. Stocks and bonds.** — Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

- (1) Buy, sell and exchange securities;
- (2) Establish, continue, modify or terminate a securities account;
- (3) Pledge securities as security in order to borrow, pay, renew or extend the time of payment of a debt of the principal;
- (4) Receive certificates and other evidences of ownership with respect to securities; and

(5) Exercise voting rights with respect to securities in person or by proxy, enter into voting trusts and consent to limitations on the right to vote. [I.C., § 15-12-206, as added by 2008, ch. 186, § 2, p. 571.]

#### OFFICIAL COMMENT

The substance of this section remains unchanged from Section 6 the Uniform Statutory Form Power of Attorney Act; however,

the wording is revised to reflect that “stocks and bonds” is now a defined term in the Act. See Section 102(14) [§ 15-12-102 (14)].

**15-12-207. Commodities and options.** — Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

- (1) Buy, sell, exchange, assign, settle and exercise commodity futures contracts and call and put options on stocks and stock indexes traded on a regulated option exchange; and
- (2) Establish, continue, modify and terminate option accounts. [I.C., § 15-12-207, as added by 2008, ch. 186, § 2, p. 572.]

**15-12-208. Banks and other financial institutions.** — Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

- (1) Continue, modify and terminate an account or other banking arrangement made by or on behalf of the principal;

(2) Establish, modify and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm or other financial institution selected by the agent;

(3) Contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

(4) Withdraw, by check, order, electronic funds transfer or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

(5) Receive statements of account, vouchers, notices and similar documents from a financial institution and act with respect to them;

(6) Enter a safe deposit box or vault and withdraw or add to the contents;

(7) Borrow money and pledge as security personal property of the principal necessary in order to borrow money or pay, renew or extend the time of payment of a debt of the principal;

(8) Make, assign, draw, endorse, discount, guarantee and negotiate promissory notes, checks, drafts and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions and accept a draft drawn by a person upon the principal and pay it when due;

(9) Receive for the principal and act upon a sight draft, warehouse receipt or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

(10) Apply for, receive and use letters of credit, credit and debit cards, electronic transaction authorizations and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(11) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution. [I.C., § 15-12-208, as added by 2008, ch. 186, § 2, p. 572.]

**15-12-209. Operation of an entity or business.** — Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

(1) Operate, buy, sell, enlarge, reduce or terminate an ownership interest;

(2) Perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege or option that the principal has, may have, or claims to have;

(3) Enforce the terms of an ownership agreement;

(4) Defend, submit to alternative dispute resolution, settle or compromise litigation to which the principal is a party because of an ownership interest;

(5) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege or option the principal has or claims to have as the holder of stocks and bonds;

(6) Defend, submit to alternative dispute resolution, settle or compromise litigation to which the principal is a party concerning stocks and bonds;

- (7) With respect to an entity or business owned solely by the principal:
- (a) Continue, modify, renegotiate, extend and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;
  - (b) Determine:
    - (i) The location of its operation;
    - (ii) The nature and extent of its business;
    - (iii) The methods of manufacturing, selling, merchandising, financing, accounting and advertising employed in its operation;
    - (iv) The amount and types of insurance carried; and
    - (v) The mode of engaging, compensating and dealing with its employees and accountants, attorneys or other agents;
  - (c) Change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and
  - (d) Demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;
- (8) Put additional capital into an entity or business in which the principal has an interest;
- (9) Join in a plan of reorganization, consolidation, conversion, domestication or merger of the entity or business;
- (10) Sell or liquidate an entity or business or part of it;
- (11) Establish the value of an entity or business under a buy-out agreement to which the principal is a party;
- (12) Prepare, sign, file and deliver reports, compilations of information, returns or other papers with respect to an entity or business and make related payments; and
- (13) Pay, compromise or contest taxes or assessments and perform any other act to protect the principal from illegal or unnecessary taxation, fines, penalties or assessments with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney. [I.C., § 15-12-209, as added by 2008, ch. 186, § 2, p. 573.]

#### OFFICIAL COMMENT

The substance of this section remains unchanged from Section 9 of the Uniform Statutory Form Power of Attorney Act; however, the wording is updated to encompass all mod-

ern business and entity forms, including limited liability companies, limited liability partnerships, and entities that may be organized other than for a business purpose.

**15-12-210. Insurance and annuities.** — Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

- (1) Continue, pay the premium or make a contribution on, modify, exchange, rescind, release or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal



or another person, whether or not the principal is a beneficiary under the contract;

(2) Procure new, different and additional contracts of insurance and annuities for the principal and the principal's spouse, children and other dependents, and select the amount, type of insurance or annuity and mode of payment;

(3) Pay the premium or make a contribution on, modify, exchange, rescind, release or terminate a contract of insurance or annuity procured by the agent;

(4) Apply for and receive a loan secured by a contract of insurance or annuity;

(5) Surrender and receive the cash surrender value on a contract of insurance or annuity;

(6) Exercise an election;

(7) Exercise investment powers available under a contract of insurance or annuity;

(8) Change the manner of paying premiums on a contract of insurance or annuity;

(9) Change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

(10) Apply for and procure a benefit or assistance under a statute or governmental regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

(11) Collect, sell, assign, hypothecate, borrow against or pledge the interest of the principal in a contract of insurance or annuity;

(12) Select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

(13) Pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment. [I.C., § 15-12-210, as added by 2008, ch. 186, § 2, p. 574.]

#### OFFICIAL COMMENT

This section contains a significant change from Section 10 of the Uniform Statutory Form Power of Attorney Act. The default language in the Uniform Statutory Form Power of Attorney Act permitted an agent to designate the beneficiary of an insurance contract. *See* Unif. Statutory Form Power of Atty. Act § 10(4) (1988). However, under Section 210 [this section] of this Act, an agent does not have authority to “create or change a beneficiary designation” unless that authority is specifically granted to the agent pursuant to

Section 201(a) [§ 15-12-201(1)]. The authority granted under Paragraph (2) of Section 210 [this section] is more limited, allowing an agent to only “procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents.” A principal who grants authority to an agent under Section 210 [this section] should therefore carefully consider whether a specific grant of authority to create or change beneficiary designations is also desirable.

**15-12-211. Estates, trusts and other beneficial interests.** — (1) In this section, “estates, trusts, and other beneficial interests” means a trust, probate estate, guardianship, conservatorship, escrow or custodianship, or

any other fund from which the principal is, may become, or claims to be, entitled to a share or payment.

(2) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts and other beneficial interests authorizes the agent to:

(a) Accept, receive, receipt for, sell, assign, pledge or exchange a share in or payment from the estate, trust or beneficial interest;

(b) Demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of the estate, trust or beneficial interest, by litigation or otherwise;

(c) Exercise for the benefit of the principal a presently exercisable power of appointment held by the principal;

(d)(i) Initiate, participate in, submit to alternative dispute resolution, settle, oppose or propose or accept a compromise with respect to litigation to:

1. Ascertain the meaning, validity or effect of a deed, will, declaration of trust or other instrument or transaction affecting the interest of the principal; or

2. Remove, substitute or surcharge a fiduciary; and

(ii) Regardless of whether or not language in a power of attorney grants general authority with respect to estates, trusts and other beneficial interests, the agent is authorized to enter into any resolution of disputes and other matters involving trusts and estates judicially or nonjudicially as provided in part 1, chapter 8, title 15, Idaho Code;

(e) Conserve, invest, disburse or use anything received for an authorized purpose;

(f) Transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities and other property to the trustee of a trust created by the principal as settlor; and

(g)(i) Release or consent to a reduction in or modification of a share in or payment from the estate, trust or beneficial interest; and

(ii) Regardless of whether or not language in a power of attorney grants general authority with respect to estates, trusts and other beneficial interests, the agent is authorized to reject, renounce or disclaim a share in or payment from the estate, trust or beneficial interest pursuant to section 15-2-801, Idaho Code. [I.C., § 15-12-211, as added by 2008, ch. 186, § 2, p. 574.]

#### OFFICIAL COMMENT

This section, which corresponds to Section 11 of the Uniform Statutory Form Power of Attorney Act, has been revised to clarify that an agent's authority includes authority to exercise, for the benefit of the principal, a

presently exercisable general power of appointment held by the principal (subsection (b)(3) [(2)(c)]). "Presently exercisable general power of appointment" is defined for purposes of the Act in Section 102(8) [§ 15-12-108(8)].

**15-12-212. Claims and litigation.** — Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to

perform any lawful act on behalf of the principal in connection with claims and litigation, including:

(1) Assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance or other relief;

(2) Bring an action to determine adverse claims, intervene in litigation and seek to act as *amicus curiae*;

(3) Seek an attachment, garnishment, order of arrest or other preliminary, provisional or intermediate relief and use an available procedure to effect or satisfy a judgment, order or decree;

(4) Perform any lawful act, including make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination before trial and bind the principal in litigation;

(5) Submit to alternative dispute resolution, settle and propose or accept a compromise;

(6) Waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement or other instrument in connection with the prosecution, settlement or defense of a claim or litigation;

(7) Act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value;

(8) Pay a judgment, award or order against the principal or a settlement made in connection with litigation or alternative dispute resolution; and

(9) Receive money or another thing of value paid in settlement of or as proceeds of a claim or litigation. [I.C., § 15-12-212, as added by 2008, ch. 186, § 2, p. 575.]

**15-12-213. Personal and family maintenance.** — (1) Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

(a) Perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(i) The principal's children;

(ii) Other individuals legally entitled to be supported by the principal; and



- (iii) Those individuals whom the principal has customarily supported or indicated the intent to support;
  - (b) Make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;
  - (c) Provide living quarters for those individuals described in paragraph (a) of this subsection by purchase, lease or other contract or pay the operating costs, including interest, amortization payments, repairs, improvements and taxes, on premises owned by the principal or occupied by those individuals;
  - (d) Provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and professional-technical education and other current living costs for those individuals described in paragraph (a) of this subsection;
  - (e) Pay expenses for necessary health care and custodial care on behalf of the individuals described in paragraph (a) of this subsection;
  - (f) Act as the principal's personal representative pursuant to the health insurance portability and accountability act, sections 1171 through 1179 of the social security act, 42 U.S.C. section 1320d through 1320d-8, as amended, and applicable regulations, in making decisions related to the past, present or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;
  - (g) Continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring and replacing them for the individuals described in paragraph (a) of this subsection;
  - (h) Maintain credit and debit accounts for the convenience of the individuals described in paragraph (a) of this subsection and open new accounts to accomplish a lawful purpose; and
  - (i) Continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order or other organization or to continue contributions to those organizations.
- (2) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this chapter. [I.C., § 15-12-213, as added by 2008, ch. 186, § 2, p. 576.]

#### STATUTORY NOTES

**Federal References.** — The health insurance portability and accountability act, referred to in paragraph (1)(f), is P.L. 104-191,

110 Stat. 1936, which is codified in scattered sections in Title 42 of the United States Code.

#### OFFICIAL COMMENT

This section, based on Section 13 of the Uniform Statutory Form Power of Attorney Act, contains three important changes. The

first is clarification in subsection (a)(1) [(1)(a)] of who qualifies to benefit from payments for personal and family maintenance. Paragraph

(1) [(a)] states that the individuals who may benefit include not only the principal's children and other individuals legally entitled to be supported by the principal, but also "individuals whom the principal has customarily supported or indicated the intent to support," "whether living when the power of attorney is executed or later born." This definition is broad enough to include common recipients of family support such as parents and later-born grandchildren if such support is intended by the principal.

The second important addition to Section 213 [this section] is the inclusion of paragraph (6) [(f)] in subsection (a) [(1)] which qualifies the agent to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that the agent can communicate with health care providers in order to pay medical bills. *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must ... treat a personal representative as the individual"). Section 213 [this section]

does not, however, empower the agent to make health-care decisions for the principal. *See* Section 103 [§ 15-12-103] and comment (discussing exclusion from this Act of powers to make health-care decisions).

The third important addition to this section is subsection (b) [(2)] which provides that authority under Section 213 [this section] is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to making gifts. Although payments made for the benefit of persons under Section 213 [this section] may in fact be subject to gift tax treatment, subsection (b) [(2)] clarifies that the authority for personal and family maintenance payments by an agent emanates from this section rather than Section 217 [§ 15-12-217]. This is an important distinction because the Act requires a grant of specific authority under Section 201(a) [§ 15-12-201(1)] to authorize gift making, and the default provisions of Section 217 [§ 15-12-217] limit the amounts of those gifts. The authority to make payments under Section 213 [this section] is not constrained by either of these provisions.

**15-12-214. Benefits from governmental programs or civil or military service.** — (1) In this section, "benefits from governmental programs or civil or military service" means any benefit, program or assistance provided under a statute or governmental regulation including social security, medicare and medicaid.

(2) Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

(a) Execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in section 15-12-213(1)(a), Idaho Code, and for shipment of their household effects;

(b) Take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate or other instrument for that purpose;

(c) Enroll in, apply for, select, reject, change, amend or discontinue, on the principal's behalf, a benefit or program;

(d) Prepare, file and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal claims to be entitled under a statute or governmental regulation;

(e) Prosecute, defend, submit to alternative dispute resolution, settle and propose or accept a compromise with respect to any benefit or assistance the principal may be entitled to receive under a statute or governmental regulation; and

(f) Receive the financial proceeds of a claim of the type described in paragraph (d) of this subsection and conserve, invest, disburse or use anything so received for a lawful purpose. [I.C., § 15-12-214, as added by 2008, ch. 186, § 2, p. 577.]

**15-12-215. Retirement plans.** — (1) In this section, “retirement plan” means any plan or account created by an employer, the principal or another individual for the purpose of providing retirement benefits or deferred compensation of which the principal is a participant, beneficiary or owner, including a plan or account under the following sections of the Internal Revenue Code:

- (a) An individual retirement account under Internal Revenue Code section 408, 26 U.S.C. section 408, as amended;
- (b) A Roth individual retirement account under Internal Revenue Code section 408A, 26 U.S.C. section 408A, as amended;
- (c) A deemed individual retirement account under Internal Revenue Code section 408(q), 26 U.S.C. section 408(q), as amended;
- (d) An annuity or mutual fund custodial account under Internal Revenue Code section 403(b), 26 U.S.C. section 403(b), as amended;
- (e) A pension, profit-sharing, stock bonus or other retirement plan qualified under Internal Revenue Code section 401(a), 26 U.S.C. section 401(a), as amended;
- (f) A plan under Internal Revenue Code section 457(b), 26 U.S.C. section 457(b), as amended; and
- (g) A nonqualified deferred compensation plan under Internal Revenue Code section 409A, 26 U.S.C. section 409A, as amended.

(2) Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

- (a) Select the form and timing of payments under a retirement plan and withdraw benefits from a plan;
  - (b) Make a rollover, including a direct trustee to trustee rollover, of benefits from one (1) retirement plan to another;
  - (c) Establish a retirement plan in the principal’s name;
  - (d) Make contributions to a retirement plan;
  - (e) Exercise investment powers available under a retirement plan; and
  - (f) Borrow from, sell assets to or purchase assets from a retirement plan.
- [I.C., § 15-12-215, as added by 2008, ch. 186, § 2, p. 578.]

#### OFFICIAL COMMENT

This section, based on Section 15 of the Uniform Statutory Form Power of Attorney Act, has been substantially updated to reflect changes in the laws governing retirement plans. A significant departure from the Uniform Statutory Form Power of Attorney Act is the deletion of default authority in the agent to waive the right of the principal to be a

beneficiary of a joint or survivor annuity (see Unif. Statutory Form Power of Atty. Act § 15 (1988)). Under this Act, the authority to waive the principal’s right to be a beneficiary of a joint and survivor annuity must be given by a specific grant pursuant to Section 201(a) [§ 15-12-201(1)].



**15-12-216. Taxes.** — Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

(1) Prepare, sign and file federal, state, local and foreign income, gift, payroll, property, federal insurance contributions act and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters and any other tax related documents, including receipts, offers, waivers, consents, including consents and agreements under Internal Revenue Code section 2032A, 26 U.S.C. section 2032A, as amended, closing agreements and any power of attorney required by the internal revenue service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following twenty-five (25) tax years;

(2) Pay taxes due, collect refunds, post bonds, receive confidential information and contest deficiencies determined by the internal revenue service or other taxing authority;

(3) Exercise any election available to the principal under federal, state, local or foreign tax law; and

(4) Act for the principal in all tax matters for all periods before the internal revenue service, and any other taxing authority. [I.C., § 15-12-216, as added by 2008, ch. 186, § 2, p. 578.]

**15-12-217. Gifts.** — (1) In this section, a gift “for the benefit of” a person includes, but is not limited to, a gift to a trust, an account under the uniform transfers to minors act and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code section 529, 26 U.S.C. section 529, as amended.

(2) Unless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent to:

(a) Make outright to, or for the benefit of, a person, a gift of any of the principal’s property, including by the exercise of a presently exercisable power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code section 2503(b), 26 U.S.C. section 2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, and if the principal’s spouse agrees to consent to a split gift pursuant to Internal Revenue Code section 2513, 26 U.S.C. section 2513, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(b) Consent, pursuant to Internal Revenue Code section 2513, 26 U.S.C. section 2513, as amended, to the splitting of a gift made by the principal’s spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

(3) An agent may make a gift of the principal’s property only as the agent determines is consistent with the principal’s objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal’s best interest based on all relevant factors, including, but not limited to:

- (a) The value and nature of the principal's property;
  - (b) The principal's foreseeable obligations and need for maintenance;
  - (c) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes;
  - (d) Eligibility for a benefit, a program, or assistance under a statute or governmental regulation; and
  - (e) The principal's personal history of making or joining in making gifts.
- [I.C., § 15-12-217, as added by 2008, ch. 186, § 2, p. 579.]

### STATUTORY NOTES

**Cross References.** — Uniform transfers to minors act, § 68-801 et seq.

### OFFICIAL COMMENT

This section provides default limitations on an agent's authority to make a gift of the principal's property. Authority to make a gift must be made by a specific grant in a power of attorney (see Section 201(a)(2) [§ 15-12-201(1)(b)]; see also Section 301 [§ 15-12-301]). The mere granting to an agent of authority to make gifts does not, however, grant an agent unlimited authority. The agent's authority is subject to this section unless enlarged or further limited by an express modification in the power of attorney. Without modification, the authority of an agent under this section is limited to gifts in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion, or twice that amount if the principal and the principal's spouse consent to make a split gift.

Subsection (a) [(1)] of this section clarifies the fact that a gift includes not only outright gifts, but also gifts for the benefit of a person. Subsection (a) [(1)] provides examples of gifts

made for the benefit of a person, but these examples are not intended to be exclusive.

Subsection (c) [(3)] emphasizes that exercise of authority to make a gift, as with exercise of all authority under a power of attorney, must be consistent with the principal's objectives. If these objectives are not known, then gifts must be consistent with the principal's best interest based on all relevant factors. Subsection (c) [(3)] provides examples of factors relevant to the principal's best interest, but these examples are illustrative rather than exclusive.

To the extent that a principal's objectives with respect to the making of gifts may potentially conflict with an agent's default duties under the Act, the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules to accommodate the objectives, or both. See Section 114 [§ 15-12-114] Comment.

## PART 3. STATUTORY FORMS

**15-12-301. Statutory form power of attorney.** — A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed in this chapter.

### IDAHO STATUTORY FORM POWER OF ATTORNEY

#### IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent can make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the uniform power of attorney act, chapter 12, title 15, Idaho Code.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. The agent’s authority will continue until your death unless you revoke the power of attorney or the agent resigns.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one (1) agent. If you wish to name more than one (1) agent, you may name a coagent in the Special Instructions. Coagents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I, .... (Name of Principal) ...., name the following person as my agent:

Name of Agent: .....

Agent’s Address: .....

Agent’s Phone Number: .....

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: .....

Successor Agent’s Address: .....

Successor Agent’s Phone Number: .....

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: .....

Second Successor Agent’s Address: .....

Second Successor Agent’s Phone Number: .....

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the uniform power of attorney act, chapter 12, title 15, Idaho Code:

(INITIAL each subject you want to include in the agent’s general authority. If you wish to grant general authority over all of the subjects you may initial “All Preceding Subjects” instead of initialing each subject.)



- (...) Real Property
- (...) Tangible Personal Property
- (...) Stocks and Bonds
- (...) Commodities and Options
- (...) Banks and Other Financial Institutions
- (...) Operation of an Entity or Business
- (...) Insurance and Annuities
- (...) Estates, Trusts, and Other Beneficial Interests
- (...) Claims and Litigation
- (...) Personal and Family Maintenance
- (...) Benefits from Governmental Programs or Civil or Military Service
- (...) Retirement Plans
- (...) Taxes
- (...) All Preceding Subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

- (...) Create, amend, revoke, or terminate an inter vivos trust
- (...) Make a gift, subject to the limitations of the uniform power of attorney act, chapter 12, title 15, Idaho Code, and any special instructions in this power of attorney
- (...) Make a gift without limitations except any special instructions in this power of attorney
- (...) Create or change rights of survivorship
- (...) Create or change a beneficiary designation
- (...) Authorize another person to exercise the authority granted under this power of attorney
- (...) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- (...) Exercise fiduciary powers that the principal has authority to delegate

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

On the following lines you may give special instructions:  
.....

.....  
.....

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF CONSERVATOR (OPTIONAL)

If it becomes necessary for a court to appoint a conservator of my estate, I nominate the following person(s) for appointment:

Name of Nominee for conservator of my estate: .....  
Nominee’s Address: .....  
Nominee’s Phone Number: .....

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it is terminated or invalid.

SIGNATURE AND ACKNOWLEDGMENT

(OPTION ONE — IF YOU ARE ABLE TO SIGN ON YOUR OWN)

Your Signature: .....  
Date: .....  
Your Name Printed: .....  
Your Address: .....  
Your Phone Number: .....

NOTARY — REQUIRED FOR RECORDING AND FOR REAL  
PROPERTY

State of Idaho, county of ..., ss.

On this ... day of ..., in the year of ..., before me (here insert the name and quality of the officer), personally appeared ..., known or identified to me (or proved to me on the oath of ...), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or they) executed the same.

My commission expires on ...,...

(OPTION TWO — IF YOU ARE UNABLE TO SIGN ON YOUR OWN AND DIRECT THE NOTARY TO SIGN FOR YOU)

Signature of person by notary: .....  
Witness Signature: .....

Signature affixed by notary in the presence of (names of person and witness).

State of Idaho                    )  
                                           ) ss.  
 County of .....                )

On this ..... day of ....., in the year ....., before me (here insert the name and quality of the officer), personally appeared ....., known or identified to me (or proved to me on the oath of ..... ) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same by directing the undersigned notary to affix his signature thereto.

..... (official signature and seal)

My commission expires on ....., ....

### IMPORTANT INFORMATION FOR AGENT

#### AGENT'S DUTIES

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

- (1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) Act in good faith;
- (3) Do nothing beyond the authority granted in this power of attorney; and
- (4) Disclose your identity as an agent whenever you act for the principal by signing the name of the principal and signing your own name as "agent" in the following manner:

..... (Principal's Name) ..... by ..... (Your Signature) ..... as agent

Unless the Special Instructions in this power of attorney state otherwise, you must also:

- (1) Act loyally for the principal's benefit;
- (2) Avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) Act with care, competence and diligence;
- (4) Keep a record of all receipts, disbursements, and transactions conducted for the principal;
- (5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
- (6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

#### TERMINATION OF AGENT'S AUTHORITY

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of



attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) Death of the principal;
- (2) The principal's revocation of the power of attorney or your authority;
- (3) The occurrence of a termination event stated in the power of attorney;
- (4) The purpose of the power of attorney is fully accomplished; or
- (5) A legal action is filed with a court to end your marriage to the principal, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

## LIABILITY OF AGENT

The meaning of the authority granted to you is defined in the act. If you violate the act or act outside the authority granted, you may be liable for any damages caused by your violation.

**IF THERE IS ANYTHING ABOUT THIS DOCUMENT OR YOUR DUTIES THAT YOU DO NOT UNDERSTAND, YOU SHOULD SEEK LEGAL ADVICE.**

[I.C., § 15-12-301, as added by 2008, ch. 186, § 2, p. 579.]

## OFFICIAL COMMENT

Article 3 provides a concise, optional statutory form for creating a power of attorney under this Act (Section 301 [§ 15-12-301]). With the proliferation of power of attorney forms in the public domain, the advantage of a statutorily-sanctioned form is the promotion of uniformity in power of attorney practice. In states such as Illinois and New York, where state-sanctioned statutory forms have existed for many years, the statutory form is widely used by both lawyers and lay persons. The familiarity and common understanding achieved with the use of one statutory form also facilitates acceptance of powers of attorney. In the twenty years preceding this Act, the number of states with statutory forms has increased from only a few to eighteen.

In addition to the statutory form power of attorney, Article 3 provides an optional form for agent certification of facts pertaining to a power of attorney (Section 302 [§ 15-12-302]). Pursuant to Section 119 [§ 15-12-119], a person may request an agent to certify any factual matter concerning the principal, agent, or power of attorney. The form in Section 302 [§ 15-12-302] is intended to facilitate agent compliance with these requests. The form lists factual matters about which persons commonly request certification (*e.g.*, the principal is alive and has not revoked the power of attorney or the agent's authority), and provides a designated space for certification of additional factual statements. Both the statutory form power of attorney and the agent

certification form may be tailored to accommodate individual circumstances and objectives.

This section provides an optional form for creating a power of attorney. Any power of attorney that substantially complies with the form in Section 301 [this section] constitutes a statutory form power of attorney with the meaning and effect prescribed by the Act.

The form begins with an "Important Information" section that contains instructions for the principal and concludes with an "Important Information for Agent" section that contains general information for the agent about agent duties, events that terminate an agent's authority, and agent liability. The form is constructed to guide the principal through designation of an agent, optional designation of one or more successor agents, and selection of subject areas and acts with respect to which the principal wishes to grant the agent authority. The form also contains an option for nomination of a conservator or guardian in the event later court-appointment of a fiduciary becomes necessary (*see* Section 108 [§ 15-12-108] and Comment).

The grant of authority provisions in the form are divided into two sections: "Grant of General Authority," which corresponds to the subject areas defined in Sections 204 through 216 [§§ 15-12-204 through 15-12-216] of the Act, and "Grant of Specific Authority," which corresponds to the actions for which Section 201(a) [§ 15-12-201(1)] requires an express

grant of authority in a power of attorney. Article 2 of the Act provides statutory construction with respect to all of the subject matters in the Grant of General Authority section and for the authority to make a gift listed in the Grant of Specific Authority section. The principal may modify any authority granted in the form by using the "Special Instructions" section of the form. For example, the scope of authority to make a gift is defined by the default provisions of Section 217 [§ 15-12-217] unless the principal expands or narrows that authority in the Special Instructions.

Cautionary language in the Grant of Specific Authority section alerts the principal to the increased risks associated with a grant of authority that could significantly reduce the principal's property or alter the principal's estate plan. The form is constructed to require that the principal initial each action over which the principal grants specific authority. The separate authorization of acts covered by Section 201(a) [§ 15-12-201(1)] is intended to emphasize to the principal the significance of granting such specific authority and to minimize the risk that those actions might be authorized inadvertently.

Many principals may wish to grant an agent comprehensive authority over their day-to-day affairs. If this is the case, the principal may grant authority over all of the subject areas in the Grant of General Authority section by initialing "All Preceding Subjects." Otherwise, the principal may authorize fewer than all of the subjects listed in the Grant of General Authority section by initialing only those particular subjects.

The statutory form is drafted to follow the Act's default provisions, but it does not preclude alteration of the default rules or the exercise of other options available under the Act. For example, if not altered by the Special Instructions, the default rules embodied in a statutory form power of attorney include:

- (1) the power of attorney is durable (Section 104 [§ 15-12-104]);
- (2) the power of attorney is effective when executed (Section 109 [§ 15-12-109]);
- (3) a spouse-agent's authority terminates upon the filing of an action for dissolution, annulment, or legal separation (Section 110(b)(3) [§ 15-12-110(2)(c)]);
- (4) lapse of time does not affect an agent's authority (Section 110(c) [§ 15-12-110(3)]);
- (5) a successor agent has the same authority as the original agent (Section 111(b) [§ 15-12-111(2)]);
- (6) a successor agent may not act until all predecessors have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve (Section 111(b) [§ 15-12-111(2)]);
- (7) an agent is entitled to reimbursement of expenses reasonably incurred (Section 112 [§ 15-12-112]);
- (8) an agent is entitled to reasonable compensation (Section 112 [§ 15-12-112]);
- (9) the agent accepts appointment by exercising authority or performing duties, or by any assertion or conduct indicating acceptance (Section 113 [§ 15-12-113]);
- (10) an agent has a duty to act loyally for the principal's benefit; to act so as not to create a conflict of interest that impairs the ability to act impartially in the principal's best interest; to act with care, competence, and diligence; to keep a record of receipts, disbursements, and transactions; to cooperate with the principal's health-care agent; to attempt to preserve the principal's estate plan to the extent the plan is known to the agent and if preservation is consistent with the principal's best interest; and to account if ordered by a court or requested by the principal, a fiduciary acting for the principal, a governmental agency with authority to protect the principal, or the personal representative or successor in interest of the principal's estate (Section 114 [§ 15-12-114]);
- (11) an agent must give notice of resignation as specified in Section 118 [§ 15-12-118]; and
- (12) an agent that is not the principal's ancestor, spouse, or descendant may not exercise authority to create in the agent, or an individual to whom the agent owes support, an interest in the principal's property (Section 201(b) [§ 15-12-201(2)]).

Although the statutory form does not include express prompts for deviating from the foregoing default rules, any statutorily-sanctioned deviation from the statutory form may be indicated in, or on an addendum to, the Special Instructions.

**15-12-302. Agent's certification.** — The following optional form may be used by an agent to certify facts concerning a power of attorney.

AGENT’S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT’S AUTHORITY

State of Idaho )  
 ) ss.  
County of ..... )

I, ..... (Name of Agent)....., certify under penalty of perjury that ..... (Name of Principal) ..... granted me authority as an agent or successor agent in a Power of Attorney dated .....

- I further certify that to my knowledge:
- (1) The Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and that the Power of Attorney and my authority to act under the Power of Attorney have not terminated;
  - (2) If the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;
  - (3) If I was named as a successor agent, that the prior agent is no longer able or willing to serve; and
  - (4) (Insert other relevant statements): .....

SIGNATURE AND ACKNOWLEDGMENT

.....  
Agent’s Signature

Date: .....  
Agent’s Name Printed: .....  
Agent’s Address: .....  
Agent’s Phone Number: .....

This document was acknowledged before me on ..... (date)....., by .... (Name of Agent).....

Notary Public for Idaho: .....  
Residing at: .....  
My commission expires on: .....

[I.C., § 15-12-302, as added by 2008, ch. 186, § 2, p. 584.]

OFFICIAL COMMENT

This section provides an optional form that may be used by an agent to certify facts concerning a power of attorney. Although the form contains statements of fact about which persons commonly request certification, other factual statements may be added to the form for the purpose of providing an agent certification pursuant to Section 119 [§ 15-12-119].

PART 4. MISCELLANEOUS PROVISIONS

**15-12-401. Uniformity of application and construction.** — In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter



among the states that enact it. [I.C., § 15-12-401, as added by 2008, ch. 186, § 2, p. 585.]

**15-12-402. Relation to electronic signatures in global and national commerce act.** — This chapter modifies, limits and supersedes the federal electronic signatures in global and national commerce act, 15 U.S.C. section 7001 et seq., but does not modify, limit or supersede section 101(c) of that act, 15 U.S.C. section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. section 7003(b). [I.C., § 15-12-402, as added by 2008, ch. 186, § 2, p. 585.]

**15-12-403. Effect on existing powers of attorney.** — Except as otherwise provided in this chapter, on the effective date of this chapter:

(1) This chapter applies to a power of attorney created before, on or after the effective date of this chapter;

(2) This chapter applies to a judicial proceeding concerning a power of attorney commenced on or after the effective date of this chapter;

(3) This chapter applies to a judicial proceeding concerning a power of attorney commenced before the effective date of this chapter unless the court finds that application of a provision of this chapter would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and

(4) An act done before the effective date of this chapter is not affected by this chapter. [I.C., § 15-12-403, as added by 2008, ch. 186, § 2, p. 585.]

#### STATUTORY NOTES

**Compiler's Notes.** — The term “effective date of this chapter”, used twice in this section, refers to the effective date of chapter 12,

title 15, Idaho Code, enacted by S.L. 2008, ch. 186, effective July 1, 2008.

## TITLE 16

### JUVENILE PROCEEDINGS

#### CHAPTER.

1. EARLY INTERVENTION SERVICES, §§ 16-101 — 16-113.
2. ACTIONS IN JUSTICES' COURTS — PLACE OF TRIAL. [REPEALED.]
3. COMMENCEMENT OF ACTIONS. [REPEALED.]
4. PLEADINGS. [REPEALED.]
5. CIVIL ARREST. [REPEALED.]
6. ATTACHMENT — CLAIM AND DELIVERY. [REPEALED.]
7. TIME AND NOTICE OF TRIAL — POSTPONEMENTS. [REPEALED.]
8. ISSUES AND TRIAL. [REPEALED.]
9. JUDGMENT BY DEFAULT. [REPEALED.]
10. JUDGMENTS OTHER THAN BY DEFAULT. [REPEALED.]
11. EXECUTIONS. [REPEALED.]
12. CONTEMPTS. [REPEALED.]
13. DOCKETS OF PROBATE COURTS AND JUSTICES OF THE PEACE. [REPEALED.]

#### CHAPTER.

14. GENERAL PROVISIONS. [REPEALED.]
15. ADOPTION OF CHILDREN, §§ 16-1501 — 16-1515.
16. CHILD PROTECTIVE ACT, §§ 16-1601 — 16-1643.
17. CORRECTION OF DELINQUENT CHILDREN. [REPEALED.]
18. YOUTH REHABILITATION ACT. [REPEALED, AMENDED AND REDESIGNATED.]
19. INTERSTATE COMPACT FOR JUVENILES, §§ 16-1901 — 16-1910.
20. TERMINATION OF PARENT AND CHILD RELATIONSHIP, §§ 16-2001 — 16-2015.
21. INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, §§ 16-2101 — 16-2107.
- 22, 23. [RESERVED.]
24. CHILDREN'S MENTAL HEALTH SERVICES, §§ 16-2401 — 16-2434.

### CHAPTER 1

#### EARLY INTERVENTION SERVICES

#### SECTION.

- 16-101. Legislative findings.
- 16-102. Policy.
- 16-103. Definitions.
- 16-104. Early intervention system.
- 16-105. Interagency coordinating council.
- 16-106. Duties of coordinating council.
- 16-107. Responsibilities of the department of health and welfare.

#### SECTION.

- 16-108. Regional committees.
- 16-109. Individualized family service plan.
- 16-110. Procedural safeguards.
- 16-111. Uses of funds.
- 16-112. Prohibited use of funds.
- 16-113. Maintenance of existing program levels.

**16-101. Legislative findings.** — The legislature finds that there is an urgent and substantial need:

(1) To enhance the development of all infants and toddlers with disabilities in the state of Idaho in order to minimize developmental delay, and to maximize individual potential for adult independence;

(2) To enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities;

(3) To reduce the educational costs by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age;

(4) To reduce social services costs and to minimize the likelihood of institutionalization of individuals with disabilities;

(5) To reduce the health costs of preventable secondary impairments and disabilities by screening and monitoring children at risk and improving the long term health of infants and toddlers with disabilities; and

(6) To comply with federal law as it pertains to services for infants and toddlers with disabilities and their families. [I.C., § 16-101, as added by 1991, ch. 253, § 1, p. 620.]

### STATUTORY NOTES

**Prior Laws.** — Former section 16-101, which comprised S.L. 1905, ch. 28, § 1, reen. R.C. & C.L., § 4629; C.S., § 7052; I.C.A., § 10-101, was repealed by S.L. 1969, ch. 113, § 1, effective 12:01 A.M., January 11, 1971.

**Compiler's Notes.** — Former section 16-

101 was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

**16-102. Policy.** — The legislature intends that the policy of the state of Idaho shall be:

(1) To reaffirm the importance of the family in all areas of the child's development and to reinforce the role of the family in the decision making processes regarding their child;

(2) To provide assistance and support to the family of an infant or toddler with a disability that addresses the individual needs of the family;

(3) To develop and implement with available resources a statewide screening and tracking system for infants and toddlers at risk;

(4) To develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for all infants and toddlers with disabilities and their families;

(5) To enhance the capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities;

(6) To facilitate the coordination of payment for early intervention services from federal, state, local, and private sources including public and private insurance coverage; and

(7) To guarantee financial assistance for the purposes of coordinating early intervention services in communities and to enhance their capacity to provide individualized services to infants and toddlers with disabilities and their families. [I.C., § 16-102, as added by 1991, ch. 253, § 1, p. 620.]

**16-103. Definitions.** — In this chapter:

(1) "Allocation" means state and federal funds designated for coordination of program functions in the seven (7) regions.

(2) "Applications" mean the documents submitted by the regional infant toddler committees to the infant toddler council, detailing the budget request for the regional committee activities and comprehensive component plans for the planning and coordination of programs authorized in this chapter.

(3) "Awards and contracts" mean the state and federal funds designated by the lead agency for projects relating to planning, resource development, or provision of direct service.

(4) "Council" means the state interagency coordinating council established in section 16-105, Idaho Code.

(5) "Early intervention services" mean those services which are provided under public supervision by qualified personnel, in conformity with the



individual family service plan (IFSP), and are designed to meet the developmental needs of eligible children as defined in this chapter. These services are selected and provided in collaboration with the families; and, to the extent appropriate, are provided in types of settings in which infants and toddlers without disabilities would participate. These services, necessary to enable the child to benefit from the other early intervention services, include:

- (a) audiology;
- (b) case management services, including transitions;
- (c) family training, counseling or home-based services;
- (d) health services including dental;
- (e) medical services for diagnostic or evaluation purposes only;
- (f) nursing services;
- (g) nutrition services;
- (h) occupational therapy;
- (i) physical therapy;
- (j) psychological services;
- (k) respite care;
- (l) social work services;
- (m) special instruction/developmental therapy;
- (n) speech and language pathology services; and
- (o) transportation including the cost of travel (e.g., mileage, or travel by taxi, common carrier, or other means) and related costs (parking expense) that are necessary to enable an eligible child and the child's family to receive early intervention services.

(6) "Early intervention system" means the management structure established in this chapter, comprised of the interdependent continuum of services and activities for the provision of a statewide, comprehensive, coordinated, multidisciplinary, interagency program for young children who have a disability or are at risk.

(7) "Health and safety standards" mean those standards which address the facilities where early intervention services are offered, excluding the child's home. Such standards may include but are not limited to the dimensions or size of a facility, communicable disease, social environment, nutrition, immunization, and fire codes.

(8) "Include" means that all items named are not all of the possible items that are covered whether like or unlike the ones named.

(9) "Individualized family service plan (IFSP)" means a written plan designed to address the strengths and needs of an infant or toddler with disabilities and the family that meets the requirements of section 16-109, Idaho Code.

(10) "Infants and toddlers at risk" mean children who are in need of screening and tracking services to monitor their development because they have:

- (a) Medical or biological risk factors, which refer to prenatal, perinatal, and neonatal events which increase the probability of delayed development or result in disability (e.g., low birth weight, prematurity, abnormal neurological findings); or

(b) Environmental risk factors, which refer to high-risk environmental influences that may affect development or result in disability (e.g., adolescent parent, poverty, psychiatric stress or known history of child abuse or neglect).

(11) "Infants and toddlers with disabilities" mean children age birth to thirty-six (36) months who need early intervention services because:

(a) They are experiencing developmental delays, as measured by diagnostic instruments and procedures (referenced in administrative rules) in one (1) or more of the following areas:

- (i) physical development;
- (ii) cognitive development;
- (iii) communication, language, speech and hearing development;
- (iv) psychosocial development;
- (v) self-help skills;
- (vi) sensory skills; or

(b) They are at risk of experiencing developmental delay due to established risk factors, which refer to diagnosed disorders where the condition is known to ultimately affect development or result in disability (e.g., the congenital anomalies associated with [with] Down syndrome or hydrocephaly).

(12) "Lead agency" means the department of health and welfare.

(13) "Multidisciplinary team" means a group comprised of the parent(s) or legal guardian and the professionals described in this chapter, as appropriate, who are assembled for the purposes of assessing the developmental needs of an infant or toddler, developing the IFSP, and providing the infant or toddler and the family with the early intervention services as detailed in the IFSP design to meet the individual family needs.

(14) "Program standards" mean those standards which address the coordination and provision of early intervention services. Such standards may include, but are not limited to, service year, length of program, personnel qualifications, staff/child ratio, caseload, maximum class size, and length of day.

(15) "Qualified" means that a person has met the highest standards of state approved or recognized certification, licensing, registration or other comparable requirements that apply to the area in which the person is providing early intervention services.

(16) "Region" means one of the seven (7) administrative regions of the lead agency.

(17) "Regional committee" means an interagency coordinating committee established within each of the seven (7) administrative regions of the lead agency to facilitate interagency coordination at the regional level and provide applications for regional committee activities, planning and direction for regional program activities.

(18) "Screening and tracking services" mean the identification of infants and toddlers delayed or at risk of delay using standardized procedures, and the entry of demographic information into an automated system for periodically monitoring the child's services or need for services.

(19) "Service providers" mean those individuals or programs that deliver services to eligible infants and toddlers and their families in compliance

with the applicable standards of state and local licensing and operational rules and regulations. [I.C., § 16-103, as added by 1991, ch. 253, § 1, p. 620.]

### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted. The bracketed word "with" was inserted in (11)(b) by the compiler.

**16-104. Early intervention system.** — The early intervention system shall consist of the lead agency, council, the regional committees, program personnel, a statewide parent education and resource system, eligible children, families, advocates, and public and private providers of early intervention services. The lead agency shall identify statewide and regional early intervention staff to be responsible for planning, developing, coordinating, monitoring and evaluating the requirements of this chapter. [I.C., § 16-104, as added by 1991, ch. 253, § 1, p. 620.]

**16-105. Interagency coordinating council.** — (1) The governor shall appoint the members and the chair of the interagency coordinating council. For budgetary purposes, the council shall be assigned to the lead agency. The term of appointment for a member of the council shall be three (3) years, and members may be reappointed. In making appointments to the council, the governor shall ensure that the membership geographically represents the population of the state.

- (2) The council membership shall consist of:
  - (a) At least three (3) parents of young children with disabilities;
  - (b) At least three (3) public or private providers of early intervention services;
  - (c) At least one (1) member of the state legislature;
  - (d) At least one (1) person involved in personnel preparation;
  - (e) The superintendent of public instruction, or designee;
  - (f) A representative of the executive council of the lead agency;
  - (g) A physician skilled in early intervention;
  - (h) A representative of the council on developmental disabilities. [I.C., § 16-105, as added by 1991, ch. 253, § 1, p. 620.]

### STATUTORY NOTES

**Cross References.** — State council on developmental disabilities, § 67-6701 et seq. Superintendent of public instructions, § 67-1501 et seq.

**16-106. Duties of coordinating council.** — (1) The council shall have the following authority, duties and responsibilities, and such other functions as may be assigned by executive order:

- (a) To assist the lead agency and all other appropriate agencies in ensuring the joint development and maintenance of a statewide system of coordinated, comprehensive, multidisciplinary, interagency programs providing early intervention services to all infants and toddlers with disabil-



ities and their families. Such system shall include the following minimum components:

- (i) a definition of child and family eligibility under this program;
  - (ii) a central directory, accessible to the general public;
  - (iii) a public awareness program;
  - (iv) a child find program consistent with the individuals with disabilities education act which identifies infants and toddlers with disabilities and other risk factors;
  - (v) a comprehensive, multidisciplinary evaluation for each referred child;
  - (vi) a program of personnel development;
  - (vii) standards and certification necessary to assure qualified personnel;
  - (viii) family education and participation throughout the early intervention system;
  - (ix) a statewide data collection system for monitoring and evaluating the early intervention system. The system shall meet federal requirements;
  - (x) an individualized family services plan for each eligible child and family who chooses to participate in the program;
  - (xi) procedural safeguards that meet the requirements in section 16-110, Idaho Code.
- (b) To assist the lead agency and all other appropriate agencies to ensure:
- (i) adoption of uniform or compatible administrative rules dealing with early intervention services;
  - (ii) reasonable transition between and among the participating agencies;
  - (iii) available funds under the provisions of this chapter are shared by the participating agencies in a manner that enables the optimum provision of necessary services for the child and the family;
  - (iv) uniformity of program and health and safety standards; and
  - (v) program policies dealing with infants and toddlers with disabilities and their families reflect the policy priorities of the council.
- (c) To participate with the lead agency in the implementation of time lines for a statewide, comprehensive, coordinated, interagency system of early intervention services;
- (d) To prepare and submit periodic reports no less than annually to the governor, legislature and the lead agency on the status of early intervention programs for infants and toddlers with disabilities and their families with recommendations for timely corrective action as needed;
- (e) To develop a public awareness program focusing on early identification of infants and toddlers with disabilities;
- (f) To participate with the lead agency and other appropriate agencies in the development, maintenance, evaluation, and revision of program, health and safety standards;
- (g) To conduct public hearings and community needs assessments for the purpose of developing the state plan and applications for funding.
- (2) No member of the council shall cast a vote on any matter which would provide direct financial benefit to that member or otherwise give the

appearance of a conflict of interest. [I.C., § 16-106, as added by 1991, ch. 253, § 1, p. 620.]

### STATUTORY NOTES

**Federal References.** — The individuals with disabilities education act, referred to in paragraph (1)(a)(iv), is codified as 20 USCS § 1400 et seq.

#### **16-107. Responsibilities of the department of health and welfare.**

— The department of health and welfare, as the lead agency for administration of the provisions of this chapter, shall have primary responsibility for:

- (a) The administration of all funds appropriated to implement the provisions of this chapter;
- (b) The identification and coordination of all available financial resources within the state from federal, state, local and private sources;
- (c) The entry into formal intra-agency and interagency agreements with other agencies involved in early intervention services. The agreement(s) must include programmatic and financial responsibility, procedures for resolving disputes and additional components necessary to ensure effective cooperation and coordination among all agencies involved in the state's early intervention system. Agreements are to include statements addressing nonsubstitution or commingling of funds, interim payments and reimbursements, nonreduction of benefits and confidentiality. Agreements are to be signed by the administrators of:
  - (i) title V, social security act (relating to maternal and child health);
  - (ii) title XIX, social security act (relating to medicaid and EPSDT);
  - (iii) the head start act;
  - (iv) parts B and H of the individuals with disabilities education act;
  - (v) subpart 2, part B, chapter I of title I of elementary and secondary education act, 1964, as amended;
  - (vi) the developmentally disabled assistance and bill of rights act (PL100-146);
  - (vii) other federal programs.
- (d) The entry into contracts with service provider agencies within a local community which have been identified by the regional committee;
- (e) The development of procedures to monitor services that are provided to infants and toddlers with disabilities and their families;
- (f) The development of procedures to ensure that services are provided to infants and toddlers with disabilities and their families in a timely manner pending resolution of any disputes among public agencies or service providers;
- (g) The writing of all policy and procedures and administrative rules in conjunction with the council which are necessary for implementation of the provisions of this chapter;
- (h) Providing staff and services as may be necessary to carry out the functions of the interagency coordinating council. [I.C., § 16-107, as added by 1991, ch. 253, § 1, p. 620.]

## STATUTORY NOTES

**Federal References.** — Title V, Social Security Act, Title XIX, Social Security Act; the Head Start Act; parts B and H of the Individuals with Disabilities Education Act; and subpart 2, part b, chapter I of title I of the Elementary and Secondary Education Act, 1964, as amended, referred to in subdivisions (a)(i) to (v) are compiled as 42 USCS § 701 et

seq.; 42 USCS § 1396 et seq.; 42 USCS § 9831 et seq.; 20 USCS § 1411 et seq. and 20 USCS § 1471 et seq.; 20 USCS § 6371 et seq.

The developmentally disabled assistance and bill of rights act (P.L. 100-146), referred to in paragraph (c)(vi), was repealed by Act Oct. 30, 2000, P.L. 106-402. For present comparable provisions, see 42 USCS § 15001 et seq.

**16-108. Regional committees.** — (1) The regional director of each of the seven (7) administrative regions of the lead agency shall appoint a local interagency coordinating committee to assist the regional lead agency and all other appropriate agencies in the planning and coordinating of services for infants and toddlers with disabilities and their families who reside within the region served by the regional committee. With recommendations from the regional committee, the regional director shall appoint staff to support regional committee activities and early intervention services. Staff persons will report to the regional director.

(2) Membership on the committee shall consist of parents, agency personnel with the authority to effectively represent their agencies and other public officials and private providers.

(3) The regional interagency coordinating committee shall have the following responsibility:

- (a) To advise and assist the council on regional issues or concerns; and
- (b) To assist the lead agency and other appropriate agencies in the implementation of the early intervention system locally as stipulated in rules and regulations. [I.C., § 16-108, as added by 1991, ch. 253, § 1, p. 620.]

**16-109. Individualized family service plan.** — (1) Infants and toddlers receiving early intervention services and their families shall receive the following:

- (a) A comprehensive multidisciplinary evaluation of the strengths and needs of the infant or toddler and the family, and the identification of services to meet such needs;
- (b) An explanation of the multidisciplinary evaluation and all service options in the family's native language or through an interpreter, if necessary; and
- (c) A written individualized family service plan developed by a multidisciplinary team with the parents as fully participating members of the team.

(2) The individualized family service plan shall be developed within a reasonable time following the completed evaluation required in subsection (1) of this section. With the parent's consent, development of an interim individualized family service plan and compliance with evaluation timelines, early intervention services may commence prior to the completion of such assessment.

(3) The individualized family service plan shall be in writing and a copy of the plan shall be made available to the family, and in the family's native



language when appropriate and necessary to ensure understanding, and shall contain the following:

- (a) A statement of the infant's or toddler's present levels of physical development, cognitive development, communication, language and speech development, psychosocial development, sensory impairment and self-help skills based on objective criteria;
- (b) A statement of the family's strengths and needs related to enhancing the development of the infant or toddler with disabilities, developed with concurrence of the family;
- (c) A statement of the goals and objectives expected to be achieved for the infant or toddler and the family, including the criteria, procedures, and time lines used to determine the degree to which progress toward achieving the outcomes is being made, and whether modifications or revisions of the outcomes or services are necessary;
- (d) A statement of specific early intervention services necessary to meet the individual needs of the infant or toddler with disabilities and the family; such statement should include the frequency, intensity and the method of delivering these services;
- (e) A statement of the health status, and medical needs of the infant or toddler and family to support the development of the child, and the names of the health care providers;
- (f) The projected dates for initiation of services and the anticipated duration of such services;
- (g) The name of the case manager who will be responsible for the implementation of the plan and coordination with other agencies and persons; and
- (h) The steps to be taken in supporting the transition of the infant or toddler to other services.

(4) The individualized family service plan shall serve as the singular comprehensive service plan for all agencies involved in providing early intervention services to the infant or toddler and the family.

(5) The individualized family service plan shall be evaluated once a year and the family shall be provided a review of the plan at six (6) months intervals or more frequently where appropriate based on the needs of the infant or toddler and the family. [I.C., § 16-109, as added by 1991, ch. 253, § 1, p. 620.]

**16-110. Procedural safeguards.** — The procedural safeguards to be included in the statewide system shall provide, at a minimum, the following:

- (1) The timely administrative resolution of complaints by parents;
- (2) The right to confidentiality of personally identifiable information;
- (3) The opportunity for parents or guardian to examine and receive a copy of records relating to assessment, screening eligibility determinations, and the development and implementation of the IFSP;
- (4) Procedures to protect the rights of the infant or toddler with disabilities whenever the parents or guardian of the child are not known or are unavailable or the child is a ward of the state, including the assignment of an individual (who shall not be an employee of any state agency involved in

the provision of early intervention or other services to the child) to act as surrogate for the parents or guardian;

(5) Written notice to the parents or guardian of the infant or toddler whenever the state agency or service provider proposes, or refuses, to initiate or change the identification, evaluation, placement, or the provision of early intervention services to the infant or toddler;

(6) Written consent of the parents or guardian of the infant or toddler whenever the state agency or service provider proposes to initiate or change the identification, evaluation, placement or the provision of early intervention services to the infant or toddler;

(7) Procedures designed to assure that the notice required in subsection (5) of this section fully informs the parents or guardian, in the parents' or guardian's native language or by an interpreter of all procedures available pursuant to this section; and

(8) Procedures for impartial complaint resolution. [I.C., § 16-110, as added by 1991, ch. 253, § 1, p. 620.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**16-111. Uses of funds.** — The use of federal P.L. 99-457, part H funds as well as state funds shall be allocated by the director through collaborative regional programs to implement the statewide system required under such law, in the following priority:

(1) For early intervention services to infants and toddlers with disabilities that are not otherwise provided from other public or private funds;

(2) To expand and improve on the services for infant[s] and toddlers with disabilities that are otherwise available; and

(3) For screening and tracking of infants and toddlers at risk of developmental delay. [I.C., § 16-111, as added by 1991, ch. 253, § 1, p. 620.]

#### STATUTORY NOTES

**Federal References.** — P.L. 99-457, part H, referred to in this section, was repealed by Act June 4, 1997, P.L. 105-17.

**Compiler's Notes.** — The bracketed "s" in subdivision (2) was inserted by the compiler.

**16-112. Prohibited use of funds.** — The use of early intervention funds provided under this chapter to supplant funds from other sources is not permitted. All local and state programs for infants and toddlers with disabilities shall maintain the funding which supported infant and toddler programs at levels as of July 1, 1990. [I.C., § 16-112, as added by 1991, ch. 253, § 1, p. 620.]

**16-113. Maintenance of existing program levels.** — Nothing in this chapter shall be construed to permit:

(1) The reduction of local, state, or federal medical or other assistance available;

- (2) The alteration of eligibility under title V of the social security act (relating to maternal and child health);
- (3) The alteration of eligibility under title XIX of the social security act (relating to medicaid for infant[s] and toddlers with disabilities);
- (4) The reduction of early intervention services provided by the state department of education, the department of health and welfare, or the school for the deaf and the blind. [I.C., § 16-113, as added by 1991, ch. 253, § 1, p. 620.]

STATUTORY NOTES

**Federal References.** — Titles V and XIX of the Social Security Act, referred to in this section, are compiled as 42 USCS § 701 et seq. and 42 USCS § 1396 et seq., respectively.

**Compiler's Notes.** — The bracketed "s" in subdivision (3) was inserted by the compiler. The words enclosed in parentheses so appeared in the law as enacted.

CHAPTER 2

ACTIONS IN JUSTICES' COURTS — PLACE OF TRIAL

SECTION.  
16-201 — 16-207. [Repealed.]

16-201 — 16-207. Action in justice's court — Procedures. [Repealed.]

STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 543 — 549; R.S., R.C., & C.L., §§ 4639 — 4645; C.S., §§ 7053 — 7059; I.C.A., §§ 10-201 — 10-207, were repealed by S.L. 1969, ch. 113, § 2, effective 12:01 A.M., January 11, 1971. For present law, see I.R.C.P., Rule 40(e).

These sections were made rules of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

CHAPTER 3

COMMENCEMENT OF ACTIONS

SECTION.  
16-301 — 16-310. [Repealed.]

16-301 — 16-310. Commencement of actions — Procedures. [Repealed.]

STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 550 — 558, 560; R.S. & R.C., §§ 4650 — 4658, 4660; am. 1911, ch. 194, §§ 1, 3, p. 651; C.L., §§ 4650 — 4658, 4660; C.S., §§ 7060 — 7068, 7070; am. 1927, ch. 113, §§ 1 — 3, p. 156; am. 1929, ch. 190, § 1, p. 352; I.C.A., §§ 10-301 — 10-309, 10-311; am. 1945, ch. 65, § 1, p. 83; am. 1951, ch. 107, § 1, p. 253, were repealed by S.L. 1969, ch. 113, § 3, effective 12:01 A.M., January 11, 1971. For present law, see I.R.C.P., Rules 3(a), 4(a)-4(i), 10(a)(2), 17(c) and 25(b). These sections were made rules of proce-



dure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by

order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

## CHAPTER 4

### PLEADINGS

#### SECTION.

16-401 — 16-410. [Repealed.]

### **16-401 — 16-410. Pleadings — Forms and procedures. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 562 — 571; R.S., R.C., & C.L., §§ 4666 — 4675; C.S., §§ 7072 — 7081; I.C.A., §§ 10-401 — 10-410, were repealed by S.L. 1969, ch. 113, § 4, effective 12:01 A.M., January 11, 1971.

For present law, see I.R.C.P., Rules 7(a)—15(d), 55(c), 60(b).

These sections were made rules of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

## CHAPTER 5

### CIVIL ARREST

#### SECTION.

16-501 — 16-506. [Repealed.]

### **16-501 — 16-506. Civil arrest — Procedure. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 572 — 577; R.S., R.C., & C.L., §§ 4680 — 4685; C.S., §§ 7082 — 7087; I.C.A., §§ 10-501 — 10-506,

were repealed by S.L. 1969, ch. 113, § 5, effective 12:01 A.M., January 11, 1971.

For present law, see § 8-101 et seq.

## CHAPTER 6

### ATTACHMENT — CLAIM AND DELIVERY

#### SECTION.

16-601 — 16-605. [Repealed.]

### **16-601 — 16-605. Attachment — Procedure — Claim and delivery. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 578 — 582; R.S., R.C., & C.L., §§ 4686 — 4690; C.S., §§ 7088 — 7092; I.C.A., §§ 10-601 — 10-605,

were repealed by S.L. 1969, ch. 113, § 6, effective 12:01 A.M., January 11, 1971.

For present law, see § 8-301 et seq. and 8-501 et seq.

CHAPTER 7

TIME AND NOTICE OF TRIAL — POSTPONEMENTS

SECTION.

16-701 — 16-706. [Repealed.]

**16-701 — 16-706. Trial — Time and notice — Postponements. [Repealed.]**

STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 585 — 589; R.S., R.C., & C.L., §§ 4701 — 4705; C.S., §§ 7095 — 7099; am. 1927, ch. 113, §§ 5, 6, p. 156; I.C.A., §§ 10-701 — 10-706, were repealed by S.L. 1969, ch. 113, § 7, effective 12:01 A.M., January 11, 1971.

For present law, see I.R.C.P., Rules 5(a), 40(b), 40(c).

These sections were made rules of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

CHAPTER 8

ISSUES AND TRIAL

SECTION.

16-801 — 16-810. [Repealed.]

**16-801 — 16-810. Issues and trial — Procedures. [Repealed.]**

STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 590 — 599; R.S., R.C., & C.L., §§ 4711 — 4720; C.S., §§ 7100 — 7109; I.C.A., §§ 10-801 — 10-810, were repealed by S.L. 1969, ch. 113, § 8, effective 12:01 A.M., January 11, 1971.

For present law, see I.R.C.P., Rules 7(c), 10(c), 34(a)-34(c), 36(a), 36(b), 38(a)-39(c),

47(a), 47(b), 47(d)-47(p), 55(a)(1)-55(e).

These sections were made rules of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

CHAPTER 9

JUDGMENT BY DEFAULT

SECTION.

16-901, 16-902. [Repealed.]

**16-901, 16-902. Default judgment. [Repealed.]**

STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 583, 584; R.S. & R.C., §§ 4695, 4696; am. 1911, ch. 194, § 4, p. 652; C.L., §§ 4695, 4696; C.S., §§ 7093, 7094; I.C.A., §§ 10-901, 10-902; am.

1945, ch. 19, § 1, p. 27, were repealed by S.L. 1969, ch. 113, § 9, effective 12:01 A.M., January 11, 1971.

For present law, see I.R.C.P., Rules 55(a)(1)-55(e).

These sections were made rules of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated

March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

## CHAPTER 10

### JUDGMENTS OTHER THAN BY DEFAULT

#### SECTION.

16-1001 — 16-1009. [Repealed].  
16-1010. [Repealed.]

#### SECTION.

16-1011, 16-1012. [Repealed].

### **16-1001 — 16-1009. Judgments other than by default. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 600 — 608; R.S., §§ 4725 — 4733; reen. R.C., §§ 4725 — 4733; C.L., §§ 4725 — 4733; C.S., §§ 7110 — 7118; I.C.A., §§ 10-1001 — 10-1009; am. 1949, ch. 59, § 1, p. 103; am. 1957, ch. 107, § 1, p. 185, were repealed by S.L. 1969, ch. 113, § 10, effective 12:01 A.M., January 11, 1971.

For present law, see I.R.C.P., Rules 41(a)(1)-41(d), 54(a)-54(d)(6), 58(a), 68.

These sections were made rules of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

### **16-1010. Abstract of judgment — Filing and docketing. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised C.C.P. 1881, § 609; R.S., R.C., & C.L., § 4734; C.S., § 7119; I.C.A., § 10-1010 was repealed by S.L. 1963, ch. 223, § 1.

For present law, see I.R.C.P., Rule 58(a).

This section was made a rule of procedure

and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

### **16-1011, 16-1012. Execution from district court — Judgment not lien unless transcribed — Effect and duration of lien. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 610, 611; R.S., §§ 4730, 4735; R.C., §§ 4735, 4736; am. 1915, ch. 25, p. 78, § 1; reen. C.L., §§ 4735, 4736; C.S., §§ 7120, 7121; I.C.A., §§ 10-1011, 10-1012; am. 1963, ch. 223, §§ 2, 3, p. 631, were repealed by S.L. 1969, ch. 113, § 11,

effective 12:01 A.M., January 11, 1971.

Section 16-1011 was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.



## CHAPTER 11

### EXECUTIONS

SECTION.

16-1101 — 16-1105. [Repealed].

#### **16-1101 — 16-1105. Executions — Procedure. [Repealed.]**

### STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 612 — 616; R.S., R.C., & C.L., §§ 4741 — 4745; C.S., §§ 7122 — 7126; I.C.A., §§ 10-1101 — 10-1105, were repealed by S.L. 1969, ch. 113, § 11, effective 12:01 A.M., January 11, 1971.

For present law, see § 11-101 et seq.

These sections were made rules of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

## CHAPTER 12

### CONTEMPTS

SECTION.

16-1201 — 16-1205. [Repealed.]

#### **16-1201 — 16-1205. Contempts — Procedure. [Repealed.]**

### STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 617 — 621; R.S., R.C., & C.L., §§ 4750 — 4754; C.S., §§ 7127 — 7131; I.C.A., §§ 10-1201 — 10-

1205, were repealed by S.L. 1969, ch. 113, § 12, effective 12:01 A.M., January 11, 1971.

For present law, see § 7-601 et seq. and I.R.C.P., Rule 37(b).

## CHAPTER 13

### DOCKETS OF PROBATE COURTS AND JUSTICES OF THE PEACE

SECTION.

16-1301 — 16-1309. [Repealed.]

#### **16-1301 — 16-1309. Probate court and justices of the peace dockets — Procedures. [Repealed.]**

### STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 622 — 629; R.S., §§ 4759 — 4766; am. 1899, p. 401, §§ 1, 2; reen. R.C. & C.L., §§ 4759 — 4767; C.S., §§ 7132 — 7140; I.C.A., §§ 10-1301 — 10-

1309, were repealed by S.L. 1969, ch. 113, § 13, effective 12:01 A.M., January 11, 1971.

For present law, see I.R.C.P., Rules 79(e), 79(f).

## CHAPTER 14

## GENERAL PROVISIONS

## SECTION.

16-1401 — 16-1410. [Repealed.]

# 16-1401 — 16-1410. Actions in justices' and probate courts — General provisions. [Repealed.]

## STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised C.C.P. 1881, §§ 630 — 635, 637; R.S., R.C., & C.L., §§ 4771 — 4778; C.S., §§ 7141 — 7148; am. 1927, ch. 82, § 1, p. 100; I.C.A., §§ 10-1401 — 10-1408; am. 1935, ch. 148, §§ 1, 2, p. 366, were repealed by S.L. 1969, ch. 113, § 14, effective 12:01 A.M., January 11, 1971.

For present law, see I.R.C.P., Rules 45(a)-45(f), 54(d)(1), 63.

These sections were made rules of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

## CHAPTER 15

## ADOPTION OF CHILDREN

## SECTION.

- 16-1501. Minors and adults may be adopted.
- 16-1501A. Rights and responsibilities of parties in adoption proceedings.
- 16-1501B. Right of parent with disability to present evidence and information.
- 16-1502. Restrictions as to comparative age.
- 16-1503. Consent of husband and wife necessary.
- 16-1504. Necessary consent to adoption.
- 16-1505. Notice of adoption proceedings.
- 16-1506. Proceedings on adoption.
- 16-1507. Order of adoption.
- 16-1508. Effect of adoption.
- 16-1509. Release of child's parents from obli-

## SECTION.

- gation — Termination of rights of parents and children.
- 16-1509A. Dissolution of adoption.
- 16-1510. [Repealed.]
- 16-1511. Sealing record of proceedings.
- 16-1512. Appeal from order to district court — Binding effect of adoption order.
- 16-1513. Registration of notice of commencement of paternity proceedings.
- 16-1514. Petition for adoption of foreign born child.
- 16-1514A. International adoption.
- 16-1515. Revocation of adoption — Payment of expenses of adoptive parents.

**16-1501. Minors and adults may be adopted.** — Any minor child may be adopted by any adult person residing in and having residence in Idaho, in the cases and subject to the rules prescribed in this chapter.

(1) Persons not minors may be adopted by a resident adult in cases where the person adopting has sustained the relation of parent to such adopted person:

- (a) For a period in excess of one (1) year while the person was a minor; or
- (b) For such period of time or in such manner that the court after investigation finds a substantial family relationship has been created.

(2) Adoptions shall not be denied solely on the basis of the disability of a prospective adoptive parent.

(a) "Adaptive equipment," for purposes of this chapter, means any piece of equipment or any item that is used to increase, maintain, or improve the parenting capabilities of a parent with a disability.

(b) “Disability,” for purposes of this chapter, means, with respect to an individual, any mental or physical impairment which substantially limits one (1) or more major life activities of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning, or working, or a record of such an impairment, or being regarded as having such an impairment. Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual preference or orientation is not considered an impairment or disability. Whether an impairment substantially limits a major life activity shall be determined without consideration of the effect of corrective or mitigating measures used to reduce the effects of the impairment.

(c) “Supportive services,” as used in this chapter, means services which assist a parent with a disability to compensate for those aspects of their disability which affect their ability to care for their child and which will enable them to discharge their parental responsibilities. The term includes specialized or adapted training, evaluations, or assistance with effective use of adaptive equipment, and accommodations which allow a parent with a disability to benefit from other services, such as Braille texts or sign language interpreters. [1879, p. 8, § 1; R.S., § 2545; reen. R.C. & C.L., § 2700; C.S., § 4682; I.C.A., § 31-1101; am. 1951, ch. 283, § 1, p. 611; am. 1953, ch. 150, § 1, p. 245; am. 1972, ch. 147, § 1, p. 318; am. 1991, ch. 39, § 1, p. 78; am. 1996, ch. 195, § 1, p. 610; am. 2002, ch. 233, § 4, p. 666.]

STATUTORY NOTES

**Cross References.** — Adoption of hard-to-place children, § 56-801 et seq.

Adoption of persons born in foreign countries, new birth certificate, § 39-259.

Adoption proceedings not open to inspection except on court order, § 39-258.

**Effective Dates.** — Section 6 of S.L. 1996,

ch. 195 declared an emergency and provided that “Adoptions of adults accomplished prior to the effective date of this act shall not be subject to procedural challenge on the basis that the procedures used in the prior adoption do not meet the requirements of this act.” Approved March 12, 1996.

JUDICIAL DECISIONS

ANALYSIS

- Adult adoptions.
- Construction.
- Contracts of adoption.
- Due process.
- Grounds for adoption.
- Persons not minors.

**Adult Adoptions.**

The legislature did not intend for parental consent statute to apply to adult adoptions. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

Section 1-1622, which requires the court to adopt any suitable process or mode of process which appears most comfortable to the spirit

of the code, is not applicable to permit the court to establish the procedure for adult adoption; this is an area which is entirely statutory and should be established by the legislature. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

Since the only statutory reference to a procedure for adult adoptions is found in § 16-



1506, presumably the legislature only intended that adult adoptions be addressed and provided for under this section; however, it did not provide the procedure for such adoption. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

While this section does permit adoptions of an adult by another adult, there is no procedure set forth by which to effectuate an adult adoption; therefore, stepfather could not adopt 18-year-old stepdaughter. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

#### **Construction.**

Surrender of legal guardianship must be in accordance with law and the procedure prescribed therefor. *Ex parte Martin*, 29 Idaho 716, 161 P. 573 (1916).

#### **Contracts of Adoption.**

Contracts for adoption of children are no longer opposed to public policy of state, although those formerly made when common law was in force are invalid. *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923).

Oral contract of adoption whereby adopting party agrees to make adopted child his heir will not be specifically enforced unless it is definite and certain and is proved by his clear and convincing evidence. *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923).

#### **Due Process.**

In adoption proceeding where natural father was served with notice of the adoption and the magistrate then allowed the natural father to testify and took into consideration his testimony, natural father did not suffer any deprivation of his right to due process. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

#### **Grounds for Adoption.**

Adoption of child on the sole ground that its parents are unknown is not authorized. *Vaughan v. Hubbard*, 38 Idaho 451, 221 P. 1107 (1923).

#### **Persons Not Minors.**

By using the term "persons not minors" in this section, the legislature clearly made a distinction between a minor child and an adult child; thus, when the adoption statutes refer to "children" or "child" they are referring to a person who is not eighteen years old; therefore, there is no indication the legislature intended the parental consent statute to apply to an adult adoption. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

**Cited in:** *In re Andersen*, 99 Idaho 805, 589 P.2d 957 (1978).

### **RESEARCH REFERENCES**

**Am. Jur.** — 2 Am. Jur. 2d, Adoption, § 26 et seq.

**C.J.S.** — 2 C.J.S., Adoption of Persons, § 22 et seq.

**A.L.R.** — Adoption of adult. 21 A.L.R.3d 1012; 42 A.L.R.4th 776.

**16-1501A. Rights and responsibilities of parties in adoption proceedings.** — (1) The legislature finds that the rights and interests of all parties affected by an adoption proceeding must be considered and balanced in determining what constitutional protections and processes are necessary and appropriate.

(2) The legislature finds that:

(a) The state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children;

(b) An unmarried mother, faced with the responsibility of making crucial decisions about the future of a newborn child, is entitled to privacy, and has the right to make timely and appropriate decisions regarding her future and the future of the child, and is entitled to assurance regarding the permanence of an adoptive placement;

(c) Adoptive children have a right to permanence and stability in adoptive placements;

(d) Adoptive parents have a constitutionally protected liberty and privacy interest in retaining custody of an adopted child; and

(e) An unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth. The state has a compelling interest in requiring unmarried biological fathers to demonstrate that commitment by providing appropriate medical care and financial support and by establishing legal paternity, in accordance with the requirements of this chapter.

(3)(a) The legislature prescribes the conditions for determining whether an unmarried biological father's action is sufficiently prompt and substantial to require constitutional protection pursuant to sections 16-1504 and 16-1513, Idaho Code.

(b) If an unmarried biological father fails to grasp the opportunities to establish a relationship with his child that are available to him, his biological parental interest may be lost entirely, or greatly diminished in constitutional significance by his failure to timely exercise it, or by his failure to strictly comply with the available legal steps to substantiate it.

(c) A certain degree of finality is necessary in order to facilitate the state's compelling interest. The legislature finds that the interest of the state, the mother, the child, and the adoptive parents described in this section outweigh the interest of an unmarried biological father who does not timely grasp the opportunity to establish and demonstrate a relationship with his child in accordance with the requirements of this chapter.

(d) An unmarried biological father has the primary responsibility to protect his rights.

(e) An unmarried biological father is presumed to know that the child may be adopted without his consent unless he strictly complies with the provisions of this chapter, manifests a prompt and full commitment to his parental responsibilities, and establishes paternity.

(4) The legislature finds that an unmarried mother has a right of privacy with regard to her pregnancy and adoption plan, and therefore has no legal obligation to disclose the identity of an unmarried biological father prior to or during an adoption proceeding, and has no obligation to volunteer information to the court with respect to the father. [I.C., § 16-1501A, as added by 2000, ch. 171, § 1, p. 422.]

**16-1501B. Right of parent with disability to present evidence and information.** — If the prospective adoptive parent has a disability as defined in this chapter, the prospective adoptive parent shall have the right to provide evidence to the court regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child. Nothing in this chapter shall be construed to create any new or additional obligation on state or local governments to purchase or provide adaptive equipment or supportive services for parents with disabilities. [I.C., § 16-1501B, as added by 2002, ch. 233, § 5, p. 666.]

**16-1502. Restrictions as to comparative age.** — The person adopting a child must be at least fifteen (15) years older than the person adopted,

or twenty-five (25) years of age or older, except such age restrictions or requirements shall not apply in cases where the adopting parent is a spouse of a natural parent, and except that such age restrictions or requirements shall not apply when the person adopting an adult shows to the satisfaction of the court that a substantial relationship as a parent has been maintained for a period in excess of one (1) year. [1879, p. 8, § 2; R.S., § 2540; reen. R.C. & C.L., § 2701; I.C.A., § 31-1102; am. 1961, ch. 14, § 1, p. 15; am. 1969, ch. 247, § 1, p. 773; am. 1972, ch. 147, § 2, p. 318; am. 1991, ch. 39, § 2, p. 78.]

### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1961, ch. 14 declared an emergency. Approved February 2, 1961.

Section 3 of S.L. 1991, ch. 39 declared an emergency. Approved March 12, 1991.

### RESEARCH REFERENCES

**Am. Jur.** — 2 Am. Jur. 2d, Adoption, § 10 et seq.

### JUDICIAL DECISIONS

#### Adult Adoptions.

The legislature did not intend for parental consent statute to apply to adult adoptions. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

By using the term "persons not minors" in § 16-1501, the legislature clearly made a distinction between a minor child and an adult

child; thus, when the adoption statutes refer to "children" or "child" they are referring to a person who is not eighteen years old; therefore, there is no indication the legislature intended the parental consent statute to apply to an adult adoption. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

**16-1503. Consent of husband and wife necessary.** — A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife; nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife, not consenting, is capable of giving such consent. [1879, p. 8, § 3; R.S., § 2547; reen. R.C. & C.L., § 2702; C.S., § 4684; I.C.A., § 31-1103.]

### JUDICIAL DECISIONS

#### Construction.

Fact that this section requires consent of both husband and wife to adoption of child by either of them negatives idea that common-

law disability of married woman in this respect has been removed. *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923).

### RESEARCH REFERENCES

**Am. Jur.** — 2 Am. Jur. 2d, Adoption, § 130.

**C.J.S.** — 2 C.J.S., Adoption of Persons, §§ 49, 50.

**16-1504. Necessary consent to adoption.** — (1) Consent to adoption is required from:



- (a) The adoptee, if he is more than twelve (12) years of age, unless he does not have the mental capacity to consent;
  - (b) Both parents or the surviving parent of an adoptee who was conceived or born within a marriage, unless the adoptee is eighteen (18) years of age or older;
  - (c) The mother of an adoptee born outside of marriage;
  - (d) Any biological parent who has been adjudicated to be the child's biological father by a court of competent jurisdiction prior to the mother's execution of consent;
  - (e) An unmarried biological father of an adoptee only if the requirements and conditions of subsection (2)(a) or (b) of this section have been proven;
  - (f) Any legally appointed custodian or guardian of the adoptee;
  - (g) The guardian or conservator of an incapacitated adult, if one has been appointed;
  - (h) The adoptee's spouse, if any; and
  - (i) An unmarried biological father who has filed a voluntary acknowledgment of paternity with the vital statistics unit of the department of health and welfare pursuant to section 7-1106, Idaho Code; and
  - (j) The father of an illegitimate child who has adopted the child by acknowledgment.
- (2) In accordance with subsection (1) of this section, the consent of an unmarried biological father is necessary only if the father has strictly complied with the requirements of this section.
- (a)(i) With regard to a child who is placed with adoptive parents more than six (6) months after birth, an unmarried biological father shall have developed a substantial relationship with the child, taken some measure of responsibility for the child and the child's future, and demonstrated a full commitment to the responsibilities of parenthood by financial support of the child, of a fair and reasonable sum and in accordance with the father's ability, when not prevented from doing so by the person or authorized agency having lawful custody of the child, and either:
    - 1. Visiting the child at least monthly when physically and financially able to do so, and when not prevented from doing so by the person or authorized agency having lawful custody of the child; or
    - 2. Have regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child, and when not prevented from doing so by the person or authorized agency having lawful custody of the child.
  - (ii) The subjective intent of an unmarried biological father, whether expressed or otherwise, unsupported by evidence of acts specified in this subsection shall not preclude a determination that the father failed to meet the requirements of this subsection.
  - (iii) An unmarried biological father who openly lived with the child for a period of six (6) months within the one (1) year period after the birth of the child and immediately preceding placement of the child with adoptive parents, and who openly held himself out to be the father of

the child during that period, shall be deemed to have developed a substantial relationship with the child and to have otherwise met the requirements of this subsection.

(b) With regard to a child who is under six (6) months of age at the time he is placed with adoptive parents, an unmarried biological father shall have manifested a full commitment to his parental responsibilities by performing all of the acts described in this subsection prior to the placement for adoption of the child in the home of prospective parents or prior to the date of commencement of any proceeding to terminate the parental rights of the birth mother, whichever event occurs first. The father shall:

(i) Commence proceedings to establish paternity under section 7-1111, Idaho Code, and file with that court a sworn affidavit stating that he is fully able and willing to have full custody of the child, setting forth his plans for the care of the child, and agreeing to a court order of child support and the payment of expenses incurred in connection with the mother's pregnancy and the child's birth;

(ii) File a notice of his commencement of proceedings to establish his paternity of the child with the vital statistics unit of the department of health and welfare pursuant to section 16-1513, Idaho Code; and

(iii) If he had actual knowledge of the pregnancy, pay a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his means, and when not prevented from doing so by the person or authorized agency having lawful custody of the child.

(3) An unmarried biological father whose consent is required under subsection (1) or (2) of this section may nevertheless lose his right to consent if the court determines, in accordance with the requirements and procedures of the termination of parent and child relationship act, sections 16-2001 through 16-2015, Idaho Code, that his rights should be terminated, based on the petition of any party as set forth in section 16-2004, Idaho Code.

(4) If there is no showing that an unmarried biological father has consented to or waived his rights regarding a proposed adoption, the petitioner shall file with the court a certificate from the vital statistics unit of the department of health and welfare, signed by the state registrar of vital statistics, stating that a diligent search has been made of the registry of notices from putative fathers, of a child born out of wedlock, and that the putative father involved has not filed notice of his commencement of proceedings to establish his paternity, or if a filing is found, stating the name of the putative father and the time and date of filing. That certificate shall be filed with the court prior to the entrance of the final decree of adoption.

(5) An unmarried biological father who does not fully and strictly comply with each of the conditions provided in this section, is deemed to have waived and surrendered any right in relation to the child, including the right to notice of any judicial proceeding in connection with the adoption of the child, and his consent to the adoption of the child is not required.

(6) A minor parent has the power to consent to the adoption of his or her child. That consent is valid and has the same force and effect as a consent

executed by an adult parent. A minor parent, having executed a consent, cannot revoke that consent upon reaching the age of majority or otherwise becoming emancipated.

(7) No consent shall be required of, nor notice given to, any person whose parental relationship to such child shall have been terminated in accordance with the provisions of either chapter 16 or 20, title 16, Idaho Code, or by a court of competent jurisdiction of a sister state under like proceedings; or in any other manner authorized by the laws of a sister state. Where a voluntary child placement agency licensed by the state in which it does business is authorized to place a child for adoption and to consent to such child's adoption under the laws of such state, the consent of such agency to the adoption of such child in a proceeding within the state of Idaho shall be valid and no further consents or notices shall be required.

(8) The legislature finds that an unmarried biological father who resides in another state may not, in every circumstance, be reasonably presumed to know of, and strictly comply with, the requirements of this chapter. Therefore when all of the following requirements have been met, that unmarried biological father may contest an adoption, prior to finalization of the decree of adoption, and assert his interest in the child:

(a) The unmarried biological father resides and has resided in another state where the unmarried mother was also located or resided;

(b) The mother left that state without notifying or informing the unmarried biological father that she could be located in the state of Idaho;

(c) The unmarried biological father has, through every reasonable means, attempted to locate the mother but does not know or have reason to know that the mother is residing in the state of Idaho; and

(d) The unmarried biological father has complied with the most stringent and complete requirements of the state where the mother previously resided or was located, in order to protect and preserve his parental interest and rights in the child in cases of adoption.

(9) Notwithstanding section 7-1107, Idaho Code, a proceeding to establish paternity filed pursuant to this section may be filed prior to the birth of the child. [1879, p. 8, § 4; Act Feb. 5, 1887; R.S., § 2548; reen. R.C. & C.L., § 2703; C.S., § 4685; I.C.A., § 31-1104; am. 1957, ch. 189, § 1, p. 376; am. 1961, ch. 225, § 1, p. 361; am. 1969, ch. 188, § 1, p. 554; am. 1970, ch. 101, § 1, p. 253; am. 1990, ch. 27, § 1, p. 41; am. 1994, ch. 393, § 1, p. 1243; am. 1996, ch. 195, § 2, p. 610; am. 2000, ch. 171, § 2, p. 422; am. 2002, ch. 233, § 6, p. 666.]

## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1970, ch. 101 declared an emergency. Approved March 5, 1970.

## JUDICIAL DECISIONS

### ANALYSIS

Abandonment.

Adult adoptions.



Application.  
Consent of parents.  
Construction.  
Final and irrevocable.  
Loss of right of consent.  
Nonconsent of parents.  
Notice to parents.  
Variance.

### **Abandonment.**

Abandonment means to desert or forsake. *Finn v. Rees*, 65 Idaho 181, 141 P.2d 976 (1943).

The mere failure of the parents of a minor child, in the custody and under the care of a third party, to contribute, while it is in such custody and care, to the support and maintenance of such child for a period of one year does not itself constitute an abandonment of the minor within the purview of this section. *Smith v. Smith*, 67 Idaho 349, 180 P.2d 853 (1947).

A divorced father who, because of lack of earning power due to a physical handicap, was not required by the divorce decree to contribute to the support of his children, was given visitation rights by the decree, visited the children at infrequent and irregular intervals, and occasionally gave them presents had not abandoned his children within the meaning of this section and such children could not be adopted by their mother's subsequent husband without such father's consent. *Clayton v. Jones*, 91 Idaho 87, 416 P.2d 34 (1966).

### **Adult Adoptions.**

The legislature did not intend for parental consent statute to apply to adult adoptions. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

By using the term "persons not minors" in § 16-1501, the legislature clearly made a distinction between a minor child and an adult child; thus, when the adoption statutes refer to "children" or "child" they are referring to a person who is not eighteen years old; therefore, there is no indication the legislature intended the parental consent statute to apply to an adult adoption. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

### **Application.**

This section providing that notice to a parent in an adoption proceeding is not necessary where the parent has either abandoned or ceased to provide for the support of a minor child is not applicable when the court was without jurisdiction over the parties. *Smith v. Smith*, 67 Idaho 349, 180 P.2d 853 (1947).

### **Consent of Parents.**

Although the natural mother not only consented to the payment of her legal fees by the adopting parents, but undoubtedly insisted upon it, there was no evidence in the record

that the attorney allowed the adopting parents to regulate his professional judgment in rendering services to the natural mother; therefore, the natural mother's consent to adoption was executed without fraud, duress, or undue influence. *DeBernardi v. Steve B.D.*, 111 Idaho 285, 723 P.2d 829 (1986).

### **Construction.**

Adoption statutes open to construction and interpretation should be strictly construed and every intendment taken in favor of the natural parent not consenting to adoption. *Smith v. Smith*, 67 Idaho 349, 180 P.2d 853 (1947).

### **Final and Irrevocable.**

In the absence of fraud, duress, or undue influence, consents to adoption become final and irrevocable upon execution of the consent to adoption by the natural parents and delivery and surrender of the child to the adoptive parents; the estoppel approach to an attempted revocation of a consent to adoption is overruled. *DeBernardi v. Steve B.D.*, 111 Idaho 285, 723 P.2d 829 (1986).

### **Loss of Right of Consent.**

Loss of right of consent of natural father to adoption of child by virtue of his failure to keep up support orders pursuant to divorce decree is a matter for determination by probate court. *Wilson v. Wilson*, 73 Idaho 326, 252 P.2d 197 (1953).

Court determined that biological father had no cognizable parental rights, and, thus, his consent to adoption was not required; where he had not had his paternity established by court decree, he had never filed an acknowledgement of paternity with vital statistics, he had not filed an acknowledgement of paternity, commenced paternity proceedings, or provided any monetary support toward the mother's pregnancy, he was clearly aware of the strong possibility that he was the child's father, particularly when the child was born nine months after he had engaged in sexual relations with the mother, and he had done nothing to affirmatively establish a relationship with the child. *Doe v. Roe* (In re Doe), 142 Idaho 202, 127 P.3d 105 (2005).

### **Nonconsent of Parents.**

In order to make order of adoption valid without consent of parents it must appear in record that case comes within some of excep-

tions mentioned in this statute. Parent is not judicially deprived of his child's custody except by a final, absolute and unconditional judgment. *Jain v. Priest*, 30 Idaho 273, 164 P. 364 (1917).

Adoption without personal appearance of qualified parent cannot be sustained unless record of adoption proceeding affirmatively shows that such parent was not a resident of, and was not within, county of residence of adopting person. *Vaughan v. Hubbard*, 38 Idaho 451, 221 P. 1107 (1923).

Where the divorce complaint charged both cruelty and desertion, evidence of both was presented at the trial, and the divorce decree merely decreed "that the plaintiff have judgment and decree of this court in accordance with the complaint filed herein," there was no adjudication of cruelty so as to render consent of the defendant for adoption of her children unnecessary under this section. *Leonard v. Leonard*, 88 Idaho 485, 401 P.2d 541 (1965).

Where the divorce complaint did not charge adultery beyond such inferences as might be drawn from the allegation of cruelty in that "defendant has engaged in numerous affairs with other men" and no evidence of adultery was offered, the defendant will not be considered to have been divorced for adultery so as to render her consent to the adoption of her children unnecessary under this section. *Leonard v. Leonard*, 88 Idaho 485, 401 P.2d 541 (1965).

Lack of consent by the natural parents renders an adoption decree void. In re *Andersen*, 99 Idaho 805, 589 P.2d 957 (1978), overruled on other grounds, *DeBernardi v. Steve B.D.*, 111 Idaho 285, 723 P.2d 829 (1986).

### Notice to Parents.

As to whether parents of child must in all cases be notified of adoption proceedings, *quaere*. *Jain v. Priest*, 30 Idaho 273, 164 P. 364 (1917).

On conflicting evidence, the trial court's finding that the father had abandoned his minor children so that his consent to adoption of them was unnecessary to the validity thereof, and that he was not entitled to a notice of adoption proceeding, was sustained. *Finn v. Rees*, 65 Idaho 181, 141 P.2d 976 (1943).

This section does not dispense with notice to parents of a pending adoption proceeding even when consent of such parents is unnecessary under this section. *Leonard v. Leonard*, 88 Idaho 485, 401 P.2d 541 (1965).

By requiring that consent to adoption must be given by an "unmarried biological father who has filed a voluntary acknowledgment of paternity with the vital statistics unit of the department of health and welfare pursuant to § 7-1106," clearly, when a father files an affidavit acknowledging paternity with the knowledge and consent of the mother, he is entitled to notice of hearings and his consent must be obtained before terminating the parent child relationship. *Roe Family Servs. v. Doe (In re Baby Boy Doe)*, 139 Idaho 930, 88 P.3d 749 (2004).

### Variance.

Where there was no allegation of abandonment of a minor child by its father contained in the petition, although abandonment was recited in the order, the order was not sustained by the petition. *Smith v. Smith*, 67 Idaho 349, 180 P.2d 853 (1947).

## RESEARCH REFERENCES

**Am. Jur.** — 2 Am. Jur. 2d, Adoption, §§ 66, 67, 91.

**C.J.S.** — 2 C.J.S., Adoption of Persons, § 49 et seq.

**A.L.R.** — What constitutes undue influence in obtaining a parent's consent to adoption of child. 50 A.L.R.3d 918.

Sufficiency of parent's consent to adoption of child. 15 A.L.R.5th 1.

Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adoption — factors other than employment status. 84 A.L.R.5th 191.

**16-1505. Notice of adoption proceedings.** — (1) Notice of an adoption proceeding shall be served on each of the following persons:

- (a) Any person or agency whose consent or relinquishment is required under section 16-1504, Idaho Code, unless that right has been terminated by waiver, relinquishment, consent or judicial action, or their parental rights have been previously terminated;
- (b) Any person who has registered notice of the commencement of paternity proceedings pursuant to section 16-1513, Idaho Code;
- (c) The petitioner's spouse, if any, only if he or she has not joined in the petition;



(d) Any person who is recorded on the birth certificate as the child's father, with the knowledge and consent of the mother, unless such right to notice or parental rights have been previously terminated;

(e) Any person who is openly living in the same household with the child at the time the mother's consent is executed or relinquishment made, and who is holding himself out to be the child's father, unless such rights to notice or parental rights have been previously terminated; and

(f) Any person who is married to the child's mother at the time she executes her consent to the adoption or relinquishes the child for adoption.

(2) An unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur, and has a duty to protect his own rights and interests. He is therefore entitled to actual notice of a birth or an adoption proceeding with regard to that child only as provided in this section.

(3) Notice provided in accordance with this section need not disclose the name of the mother of the child who is the subject of an adoption proceeding.

(4) The notice required by this section may be served immediately after commencement of proceedings to adopt a child but shall be served at least twenty (20) days prior to the final dispositional hearing. The notice shall specifically state that the person served must respond to the petition for adoption within twenty (20) days of service if he intends to intervene in or contest the adoption.

(5)(a) Any person who has been served with notice of an adoption proceeding and who wishes to contest the adoption shall file a written objection to the adoption in the adoption proceeding within twenty (20) days after service. The written objection shall set forth specific relief sought and be accompanied by a memorandum specifying the factual and legal grounds upon which the written objection is based.

(b) Any person who fails to file a written objection to the adoption within twenty (20) days after service of notice waives any right to further notice in connection with the adoption, forfeits all rights in relation to the adoptee, and is barred from thereafter bringing or maintaining any action to assert any interest in the adoptee.

(6) Service of notice under this section shall be made as follows:

(a) With regard to a person whose consent is necessary under section 16-1504, Idaho Code, notice shall be given by personal service. Where reasonable efforts to effect personal service have been unsuccessful, the court shall order service by registered or certified mail to the last known address of the person to be notified and by publication once a week for three (3) successive weeks in a newspaper or newspapers to be designated by the court as most likely to give notice to the person to be served. The hearing shall take place no sooner than twenty (20) days after service of notice, or where service is by registered or certified mail and publication, the hearing shall take place no sooner than twenty (20) days after the date of last publication. Notice and appearance may be waived by any person in writing before the court or in the presence of, and witnessed by, a clerk



of court or a representative of an authorized agency, provided that such parent has been apprised by the court or by such person of the meaning and consequences of the adoption proceeding. Where the person entitled to notice resides outside the state, the waiver shall be acknowledged before a notary of the state and shall contain the current address of said person. The person who has executed such a waiver shall not be required to appear. If service is by publication, the court shall designate the content of the notice regarding the identity of the parties. The notice may not include the name of the person or persons seeking to adopt the adoptee.

(b) As to any other person for whom notice is required under this section, service by certified mail, return receipt requested, is sufficient. If that service cannot be completed after two (2) attempts, the court may issue an order providing for service by publication, posting, or by any other manner of service.

(c) Notice to a person who has registered a notice of his commencement of paternity proceedings with the vital statistics unit of the department of health and welfare in accordance with the requirements of section 16-1513, Idaho Code, shall be served by certified mail, return receipt requested, at the last address filed with the department.

(7) Proof of service of notice on all persons for whom notice is required by this section shall be filed with the court before the final dispositional hearing on the adoption.

(8) Notwithstanding any other provision of law, neither the notice of an adoption proceeding nor any process in that proceeding is required to contain the name of the person or persons seeking to adopt the adoptee.

(9) Except as to those persons whose consent to an adoption is required under section 16-1504, Idaho Code, the sole purpose of notice under this section is to enable the person served to present evidence to the court relevant to the best interest of the child. [I.C., § 16-1505, as added by 2000, ch. 171, § 4, p 422.]

STATUTORY NOTES

**Prior Laws.** — Former § 16-1505, which comprised 1879, p. 8, § 5; R.S., § 2549; reen. R.C. & C.L., § 2704; C.S., § 4686; I.C.A., § 31-1105, was repealed by S.L. 2000, ch. 171, § 3, effective July 1, 2000.

JUDICIAL DECISIONS

**In General.** In circumstances where the father and the mother both acknowledge who the biological father is and the father is willing to accept the rights and responsibilities of paternity, the provisions of §§ 16-2007 and 16-1505 apply; if, on the other hand, the mother does not join in the acknowledgment of paternity, then the father is required to follow the mandates of § 16-1513 and file proceedings for paternity and a notice with the bureau of vital records and health statistics. *Roe Family Servs. v. Doe (In re Baby Boy Doe)*, 139 Idaho 930, 88 P.3d 749 (2004).

**16-1506. Proceedings on adoption.** — (1) Proceedings to adopt a child shall be commenced by the filing of a petition together with a copy thereof. The petition shall be initiated by the person or persons proposing to adopt the child and shall be filed with the district court of the county in

which said person or persons reside. If the adoption arises from a child protective act case, the petition shall be filed in the court having jurisdiction over the child protective act case unless that court relinquishes jurisdiction over the adoption proceeding. The petitioners shall have resided and maintained a dwelling within the state of Idaho for at least six (6) consecutive months prior to the filing of a petition. The petition shall set forth the name and address of the petitioner or petitioners, the name of the child proposed to be adopted and the name by which the person to be adopted shall be known if and when adopted, the degree of relationship of the child, if any, to the petitioner or petitioners and the names of any person or agency whose consent to said adoption is necessary. At the time fixed for hearing such petition the person adopting a child, and the child adopted, and the spouse of the petitioner if a natural parent of the child, must appear before the court of the county wherein the petition was filed. The petitioner shall at such time execute an agreement to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated.

(2) Any person or persons whose consent is required shall execute such consent in writing, in a form consistent with the provisions of section 16-2005(4), Idaho Code, which consent being filed in the court where the application is made, shall be deemed a sufficient appearance on the part of such person or persons. If any adoptive parent, or a person not a minor being adopted by a resident adult under the provisions of section 16-1501, Idaho Code, is a member of the armed services and is unable to attend the hearing, his appearance and testimony shall be received by means of deposition, which shall be filed in the court at the time of the hearing.

(3) Prior to the placement for adoption of any child in the home of prospective adoptive parents, it shall be required that a thorough social investigation of the prospective adoptive family and all of its members, consistent with the rules regarding such investigations promulgated by the department of health and welfare, shall be completed and that a positive recommendation for adoptive placement shall have been made. The social investigation may be performed by any individual who meets the requirements of the law. A copy of the study must be submitted to the department and the department may impose a reasonable fee, not to exceed fifty dollars (\$50.00), for oversight of such privately conducted studies. If the prospective adoptive parent has a disability as defined in this chapter, the prospective adoptive parent shall have the right, as a part of the social study, to provide information regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child. The person performing the social investigation shall advise the prospective adoptive parent of such right and shall consider all such information in any findings or recommendations. The social investigation of any prospective adoptive parent with a disability shall be conducted by, or with the assistance of, an individual with expertise in the use of such equipment and services. Nothing in this chapter shall be construed to create any new or additional obligation on state or local governments to purchase or provide adaptive equipment or supportive services for parents with disabilities. In those instances where the prospective adoptive parent is



married to the birth parent or is the grandparent of the child to be adopted, such social investigation shall be completed with regard to the prospective adoptive parent only upon order of the court. In exigent circumstances where the prospective adoptive parents are determined by the court to have been unable to complete a social investigation of the family with a positive recommendation prior to the time the child is placed in the home, the child shall remain in the home unless the court determines the best interests of the child are served by other placement. If exigent circumstances exist, a social investigation shall be initiated within five (5) days of placement. Once initiated, all studies shall be completed within sixty (60) days. Upon the filing of a petition to adopt a minor child by a person unrelated to the child or unmarried to a natural parent of the child and at the discretion of the court upon the filing of any other petition for adoption, a copy of such petition, together with a statement containing the full names and permanent addresses of the child and the petitioners, shall be served by the court receiving the petition within five (5) days on the director of the department of health and welfare by registered mail or personal service. If no private investigation is conducted, it shall then be the duty of the said director, through the personnel of the department or through such qualified child-placing children's adoption agency incorporated under chapter 3, title 30, Idaho Code, as the director may designate, to verify the allegations of the petition, and as soon as possible not exceeding thirty (30) days after service of the petition on the director to make a thorough investigation of the matter to include in all cases information as to the alleged date and place of birth and as to parentage of the child to be adopted as well as the source of all such information and report his findings in writing to the court. The investigative report shall include reasonably known or available medical and genetic information regarding both natural parents and sources of such information as well as reasonably known or available providers of medical care and services to the natural parents. A copy of all medical and genetic information compiled in the investigation shall be made available to the adopting family by the department or other investigating children's adoption agency prior to entry of the final order of adoption. The petition, statement and all other papers, records or files relating to the adoption, including the preplacement investigation and recommendation, shall be returned to the court with the investigative report. The department of health and welfare or other children's adoption agency may require the petitioner to pay all or any part of the costs of the investigation. If the report disapproves of the adoption of the child, motion may be made to the court to dismiss the petition.

(4) Proceedings for termination of parent-child relationship in accordance with chapter 20, title 16, Idaho Code, and proceedings for adoption may be consolidated and determined at one (1) hearing provided that all of the requirements of this chapter as well as chapter 20, title 16, Idaho Code, be fully complied with. Nothing in either chapter shall be construed as limiting the initiation of any petition for approval of a verified financial plan for adoption expenses pursuant to section 18-1511, Idaho Code, prior to the birth of the child which is the subject of any adoption proceeding. In all



disputed matters under this chapter or chapter 20, title 16, Idaho Code, the paramount criterion for consideration and determination by the court shall be the best interests of the child.

(5) Proceedings for the adoption of an adult shall be as provided in subsection (1) of this section and any consents required shall be executed as provided in subsection (2) of this section. Upon a finding by the court that the consent of all persons for whom consent is required has been given and that the requirements of section 16-1501, Idaho Code, have been proven to the satisfaction of the court, the court shall enter an order granting the adoption. In cases where the adult proposed to be adopted is incapacitated or disabled, the court may require that an investigation be performed. The form and extent of the investigation to be undertaken may be as provided in subsection (3) of this section, or as otherwise ordered by the court. If an investigation is performed, the court must review and approve the findings of the investigation before issuing an order approving the adoption. [1879, p. 8, § 6; am. 1885, p. 25, § 1; R.S., § 2550; reen. R.C. & C.L., § 2705; C.S., § 4687; I.C.A., § 31-1106; am. 1951, ch. 283, § 2, p. 611; am. 1969, ch. 188, § 2, p. 554; am. 1970, ch. 14, § 1, p. 26; am. 1972, ch. 196, § 1, p. 483; am. 1974, ch. 23, § 2, p. 633; am. 1980, ch. 197, § 24, p. 433; am. 1980, ch. 368, § 1, p. 950; am. 1988, ch. 26, § 1, p. 33; am. 1988, ch. 139, § 1, p. 251; am. 1992, ch. 341, § 1, p. 1031; am. 1994, ch. 393, § 2, p. 1243; am. 1994, ch. 426, § 1, p. 1334; am. 1995, ch. 161, § 1, p. 639; am. 1996, ch. 195, § 3, p. 610; am. 2000, ch. 171, § 5, p. 422; am. 2002, ch. 233, § 7, p. 666; am. 2005, ch. 391, § 3, p. 1263.]

### STATUTORY NOTES

**Cross References.** — Child protective act, § 16-1601 et seq.

**Effective Dates.** — Section 3 of S.L. 1969, ch. 188 declared an emergency. Approved March 18, 1969.

Section 2 of S.L. 1970, ch. 14 declared an emergency. Approved February 10, 1970.

Section 34 of S.L. 1980, ch. 197 read: "(1) Section 1 and sections 3 through 33 of this act shall be in full force and effect on and after July 1, 1980.

"(2) Section 2 of this act shall be in full force and effect on and after July 1, 1981."

### JUDICIAL DECISIONS

#### ANALYSIS

Adult adoptions.

Consent.

— Final and irrevocable.

— Lack of.

— Waiver.

#### Adult Adoptions.

The legislature did not intend for parental consent statute to apply to adult adoptions. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

By using the term "persons not minors" in § 16-1501, the legislature clearly made a distinction between a minor child and an adult child; thus, when the adoption statutes refer to "children" or "child" they are referring to a person who is not eighteen years old; there-

fore, there is no indication the legislature intended the parental consent statute to apply to an adult adoption. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

Section 1-1622, which requires the court to adopt any suitable process or mode of process which appears most comfortable to the spirit of the code, is not applicable to permit the court to establish the procedure for adult adoption; this is an area which is entirely statutory and should be established by the

legislature. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

The legislature only intended that adult adoptions be addressed and provided for under § 16-1501; however, it did not provide the procedure for such adoption. *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

#### Consent.

The rule is that an attempted adoption of a minor child by its mother and her second husband without the consent of the natural father from whom the mother was granted a divorce for cruelty and by decree awarded the custody of the minor child with reservations of certain rights to the father is void; therefore, such a judgment may be attacked by the father either directly or collaterally. *Smith v. Smith*, 67 Idaho 349, 180 P.2d 853 (1947).

Loss of right of consent of natural father to adoption of child by virtue of his failure to keep up support orders pursuant to divorce decree is a matter for determination by probate court. *Wilson v. Wilson*, 73 Idaho 326, 252 P.2d 197 (1953).

Although the natural mother not only consented to the payment of her legal fees by the adopting parents, but undoubtedly insisted upon it, there was no evidence in the record that the attorney allowed the adopting parents to regulate his professional judgment in rendering services to the natural mother;

therefore, the natural mother's consent to adoption was executed without fraud, duress, or undue influence. *DeBernardi v. Steve B.D.*, 111 Idaho 285, 723 P.2d 829 (1986).

#### —Final and Irrevocable.

In the absence of fraud, duress, or undue influence, consents to adoption become final and irrevocable upon execution of the consent to adoption by the natural parents, and delivery and surrender of the child to the adoptive parents; the estoppel approach to an attempted revocation of a consent to adoption is overruled. *DeBernardi v. Steve B.D.*, 111 Idaho 285, 723 P.2d 829 (1986).

#### —Lack of.

Lack of consent by the natural parents renders an adoption decree void. In *re Andersen*, 99 Idaho 805, 589 P.2d 957 (1978), overruled on other grounds, *DeBernardi v. Steve B.D.*, 111 Idaho 285, 723 P.2d 829 (1986).

#### —Waiver.

The informal consent procedure provided for by this section fails to make any allowance for requiring a showing that the waiver effected thereby is made voluntarily, knowingly, and intelligently. In *re Andersen*, 99 Idaho 805, 589 P.2d 957 (1978), overruled on other grounds, *DeBernardi v. Steve B.D.*, 111 Idaho 285, 723 P.2d 829 (1986).

### RESEARCH REFERENCES

**Am. Jur.** — 2 Am. Jur. 2d, Adoption, § 107 et seq.

**C.J.S.** — 2 C.J.S., Adoption of Persons, § 77 et seq.

**16-1507. Order of adoption.** — The judge must examine all persons appearing before him pursuant to this chapter, each separately, and any report of the investigation provided pursuant to the last section and if satisfied that the interests of the child will be promoted by the adoption, he must in the adoption of all foreign born persons make a finding of facts as to the true or probable date and place of birth of the foreign born child to be adopted and make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting. [1879, p. 8, § 7; R.S., § 2551; reen. R.C. & C.L., § 2706; C.S., § 4688; I.C.A., § 31-1107; am. 1951, ch. 283, § 3, p. 611; am. 1988, ch. 26, § 2, p. 33; am. 1996, ch. 188, § 1, p. 595.]

### JUDICIAL DECISIONS

#### ANALYSIS

Contents.

Direct or collateral attack.

Practice and procedure.

**Contents.**

An order of adoption is not rendered void by a recital therein that the consent of named persons designated as parents of the children was the only consent necessary to their adoption, where the named persons, though not parents of the children, were foster parents of the deceased mother of the children and foster parents of the children themselves who had been abandoned to them by the children's father, and who were the next of kin, in the county, upon whom the children were dependent for food and care. *Finn v. Rees*, 65 Idaho 181, 141 P.2d 976 (1943).

**Direct or Collateral Attack.**

Order of adoption may be attacked either directly or collaterally where record of pro-

ceedings shows lack of statutory power to make such order. *Vaughan v. Hubbard*, 38 Idaho 451, 221 P. 1107 (1923).

**Practice and Procedure.**

While the magistrate judge had the authority to deny the adoption of the children by family that had been selected by the department of health & welfare if it was satisfied the interests of the children would not be promoted by the adoption, it did not have the authority to choose the foster parents as the adoptive parents over the department's selection. *Idaho Dep't of Health & Welfare v. Hays*, 137 Idaho 233, 46 P.3d 529 (2002).

**Cited in:** *DeBernardi v. Steve B.D.*, 111 Idaho 285, 723 P.2d 829 (1986).

**RESEARCH REFERENCES**

**Am. Jur.** — 2 Am. Jur. 2d, Adoption, §§ 53, 142, 146.

**C.J.S.** — 2 C.J.S., Adoption of Persons, § 103 et seq.

**A.L.R.** — Religion as factor in adoption

proceedings. 48 A.L.R.3d 383.

Race as factor in adoption proceedings. 34 A.L.R.4th 167.

Postadoption visitation by natural parent. 78 A.L.R.4th 218.

**16-1508. Effect of adoption.** — A child or adult, when adopted, may take the name of the person adopting, and the two (2) shall thenceforth sustain toward each other the legal relation of parent and child, and shall have all the rights and shall be subject to all the duties of that relation, including all of the rights of a child of the whole blood to inherit from any person, in all respects, under the provisions of section 14-103 [15-2-103], Idaho Code, and to the same extent as a child of the whole blood. [1879, p. 8, § 8; R.S., § 2552; reen. R.C. & C.L., § 2707; C.S., § 4689; I.C.A., § 31-1108; am. 1963, ch. 63, § 1, p. 246; am. 1996, ch. 195, § 4, p. 610.]

**STATUTORY NOTES**

**Compiler's Notes.** — The bracketed insertion near the end of the section was added by the compiler. The section 14-103 referenced here was repealed by S.L. 1971, ch. 111, § 3.

**Effective Dates.** — Section 2 of S.L. 1963, ch. 63 declared an emergency. Approved March 6, 1963.

**RESEARCH REFERENCES**

**Am. Jur.** — 2 Am. Jur. 2d, Adoption, § 163 et seq.

**C.J.S.** — 2 C.J.S., Adoption of Persons, § 136 et seq.

**16-1509. Release of child's parents from obligation — Termination of rights of parents and children.** — Unless the decree of adoption otherwise provides, the natural parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibilities for, the child so adopted, and have no right over it, and all rights of such child from and through such natural parents including the right of inheritance, are hereby terminated unless specifically provided by



will. [1879, p. 8, § 9; R.S., § 2553; reen. R.C. & C.L., § 2708; C.S., § 4690; I.C.A., § 31-1109; am. 1969, ch. 334, § 1, p. 1058.]

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

**Workmen's Compensation.**  
Minor children are entitled to payment of workmen's compensation benefits growing out of the death of their father in covered

employment even if the children had been legally adopted by a married couple. In re Jones, 84 Idaho 327, 372 P.2d 406 (1962).

RESEARCH REFERENCES

**Am. Jur.** — 2 Am. Jur. 2d, Adoption, § 163 et seq.  
**C.J.S.** — 2 C.J.S., Adoption of Persons, § 138.  
**A.L.R.** — Action for death of adoptive par-

ent, by or for benefit of adopted or equitably adopted child. 94 A.L.R.3d 347.  
Adopted child as within class named in deed or inter vivos trust instrument. 37 A.L.R.5th 237.

**16-1509A. Dissolution of adoption.** — An adoption may be dissolved, upon petition, with the agreement of both the adoptee and the adopting parent, when the adopting parent was the spouse of a natural parent, and the marriage of the natural parent and adoptive parent was terminated. If the petition for dissolution occurs after the death of the adoptive parent, the court shall, in the finding of dissolution, specify the effect upon rights of inheritance. The court must determine that avoidance of statutory care is not the purpose of the dissolution, unless the court finds grounds to waive this finding. An action to obtain a decree of dissolution of adoption may be commenced at any time after the adoptee reaches twenty-one (21) years of age. [I.C., § 16-1509A, as added by 1998, ch. 167, § 1, p. 562.]

**16-1510. Adoption of illegitimate child. [Repealed.]**

STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised 1879, p. 8, § 10; R.S., § 2554; reen. R.C. & C.L., § 2709; C.S., § 4691; I.C.A.,

§ 31-1110; am. 1965, ch. 41, § 1, p. 64, was repealed by S.L. 2000, ch. 171, § 6, effective July 1, 2000.

**16-1511. Sealing record of proceedings.** — Upon the motion of petitioners, or upon its own motion the court shall order that the record of its proceedings in any adoption proceeding shall be sealed. When such order has been made and entered the court shall seal such record and thereafter the seal shall not be broken except upon the motion of petitioners or the person adopted; provided, however, that such record may be sealed again as in this section provided. [I.C., § 16-1511, as added by 1953, ch. 104, § 1, p. 138; am. 1996, ch. 195, § 5, p. 610.]

STATUTORY NOTES

**Effective Dates.** — Section 6 of S.L. 1996, ch. 195 declared an emergency and provided

that "Adoptions of adults accomplished prior to the effective date of this act shall not be

subject to procedural challenge on the basis that the procedures used in the prior adoption do not meet the requirements of this act.” Approved March 12, 1996.

### JUDICIAL DECISIONS

**Cited in:** Dalton v. Idaho Dairy Prods. Comm’n, 107 Idaho 6, 684 P.2d 983 (1984).

### RESEARCH REFERENCES

**Am. Jur.** — 2 Am. Jur. 2d, Adoption, § 128 et seq. records of concluded adoption proceedings. 103 A.L.R.5th 255.

**A.L.R.** — Restricting access to judicial

**16-1512. Appeal from order to district court — Binding effect of adoption order.** — (1) An appeal may be taken to the district court of the county from an order of the magistrates division of the district court granting or refusing to grant an order of adoption or from any other intermediate order in adoption proceedings.

(2) After the order of adoption by the court becomes final, no party to an adoption proceeding, nor anyone claiming under such party, may later question the validity or [of] the adoption proceedings by reason of any defect or irregularity therein, jurisdiction or otherwise, but shall be fully bound by the order, except for such appeal as may be allowed in subsection (1) of this section. In no event, for any reason, other than fraud on the part of the party adopting a child, shall an adoption be overturned by any court or collaterally attacked by any person or entity after six (6) months from the date the order of adoption becomes final. This provision is intended as a statute of repose. [I.C.A., § 16-1512, as added by 1957, ch. 189, § 2, p. 376; am. 1971, ch. 170, § 1, p. 805; am. 2000, ch. 173, § 1, p. 441.]

### STATUTORY NOTES

**Compiler’s Notes.** — The bracketed insertion in the first sentence in subsection (2) was added by the compiler for clarity.

### RESEARCH REFERENCES

**C.J.S.** — 2 C.J.S., Adoption of Persons, § 109 et seq.

**16-1513. Registration of notice of commencement of paternity proceedings.** — (1) A person who is the father or claims to be the father of a child born out of wedlock may claim rights pertaining to his paternity of the child by commencing proceedings to establish paternity under section 7-1111, Idaho Code, and by filing with the vital statistics unit of the department of health and welfare notice of his commencement of proceedings to establish his paternity of the child born out of wedlock. The vital statistics unit of the department of health and welfare shall provide forms for the purpose of filing the notice of commencement of paternity proceedings, and the forms shall be made available through the vital statistics unit

of the Idaho department of health and welfare and in the office of the county clerk in every county of this state. The forms shall include a written notification that filing pursuant to this section shall not satisfy the requirements of chapter 82, title 39, Idaho Code, and the notification shall also include the following statements:

(a) A parent may make a claim of parental rights of an abandoned child, abandoned pursuant to the provisions of chapter 82, title 39, Idaho Code, as provided by section 39-8206, Idaho Code, by filing a notice of claim of parental rights with the vital statistics unit of the department of health and welfare on a form as prescribed and provided by the vital statistics unit of the department of health and welfare;

(b) The vital statistics unit of the department of health and welfare shall maintain a separate registry for claims to abandoned children, abandoned pursuant to the provisions of chapter 82, title 39, Idaho Code;

(c) The department shall provide forms for the purpose of filing a claim of parental rights of an abandoned child, abandoned pursuant to the provisions of chapter 82, title 39, Idaho Code, and the forms shall be made available through the vital statistics unit of the Idaho department of health and welfare and in the office of the county clerk in every county of this state;

(d) To be valid, a claim of parental rights of an abandoned child, abandoned pursuant to the provisions of chapter 82, title 39, Idaho Code, must be filed before an order terminating parental rights is entered by the court. A parent that fails to file a claim of parental rights prior to entry of an order terminating their parental rights is deemed to have abandoned the child and waived and surrendered any right in relation to the child, including the right to notice of any judicial proceeding in connection with the termination of parental rights or adoption of the child;

(e) Registration of notice of commencement of paternity proceedings pursuant to chapter 15, title 16, Idaho Code, shall not satisfy the requirements of chapter 82, title 39, Idaho Code. To register a parental claim to an abandoned child, abandoned pursuant to the provisions of chapter 82, title 39, Idaho Code, an individual must file an abandoned child registry claim with the vital statistics unit of the department of health and welfare and comply with all other provisions of chapter 82, title 39, Idaho Code, in the time and manner prescribed, in order to preserve parental rights to the child.

When filing a notice of the commencement of paternity proceedings, a person who claims to be the father of a child born out of wedlock, shall file with the vital statistics unit of the department of health and welfare, the completed form prescribed by the vital statistics unit of the department of health and welfare. Said form will be filled out completely, signed by the person claiming paternity, and witnessed before a notary public.

(2) The notice of the commencement of paternity proceedings may be filed prior to the birth of the child, but must be filed prior to the placement for adoption of the child in the home of prospective parents or prior to the date of commencement of any proceeding to terminate the parental rights of the birth mother, whichever event occurs first. The notice of the commencement



of paternity proceedings shall be signed by the person filing the notice and shall include his name and address, the name and last address of the mother, and either the birth date of the child or the probable month and year of the expected birth of the child. The vital statistics unit of the department of health and welfare shall maintain a registry for this purpose which shall be subject to disclosure according to chapter 3, title 9, Idaho Code. The department shall record the date and time the notice of the commencement of proceedings is filed with the department. The notice shall be deemed to be duly filed with the department as of the date and time recorded on the notice by the department.

(3) If the unmarried biological father does not know the county in which the birth mother resides, he may initiate his action in any county, subject to a change in venue.

(4) Any father of a child born out of wedlock who fails to file and register his notice of the commencement of paternity proceedings prior to the placement for adoption of the child in the home of prospective parents or prior to the date of commencement of any proceeding to terminate the parental rights of the birth mother, whichever event occurs first, is deemed to have waived and surrendered any right in relation to the child and shall be barred from thereafter bringing or maintaining any action to establish his paternity of the child. Failure of such filing or registration shall constitute an abandonment of said child. The filing and registration of a notice of the commencement of paternity proceedings by a putative father shall constitute prima facie evidence of the fact of his paternity in any contested proceeding under chapter 11, title 7, Idaho Code. The filing of a notice of the commencement of paternity proceedings shall not be a bar to an action for termination of his parental rights under chapter 20, title 16, Idaho Code.

(5) In any adoption proceeding pertaining to a child born out of wedlock, if there is no showing that the putative father has consented to the adoption, a certificate shall be obtained from the vital statistics unit of the department of health and welfare, signed by the state registrar of vital statistics, which certificate shall state that a diligent search has been made of the registry of notices from putative fathers, and that no filing has been found pertaining to the father of the child in question, or if a filing is found, stating the name of the putative father and the time and date of filing. That certificate shall be filed with the court prior to entry of a final decree of adoption.

(6) Identities of putative fathers can only be released pursuant to procedures contained in chapter 3, title 9, Idaho Code.

(7) To cover the cost of implementing and maintaining said registry, the vital statistics unit of the department of health and welfare shall charge a filing fee of ten dollars (\$10.00) at the time the putative father files his notice of his commencement of proceedings. It is the intent of the legislature that the fee shall cover all direct and indirect costs incurred pursuant to this section. The board of health and welfare shall annually review the fees and expenses incurred pursuant to administering the provisions of this section.

(8) Consistent with its authority denoted in the vital statistics act, section 39-242(c), Idaho Code, the board of health and welfare shall adopt, amend

and repeal rules for the purpose of carrying out the provisions of this section. [I.C., § 16-1513, as added by 1985, ch. 54, § 7, p. 106; am. 1990, ch. 213, § 9, p. 15; am. 1992, ch. 341, § 2, p. 1031; am. 1994, ch. 393, § 3, p. 1243; am. 2000, ch. 171, § 7, p. 422; am. 2001, ch. 357, § 2, p. 1252; am. and redesisg. 2005, ch. 25, § 75, p. 82; am. 2005, ch. 391, § 4, p. 1263.]

STATUTORY NOTES

**Cross References.** — State registrar of vital statistics, § 39-243.  
Vital statistics unit, § 39-242.  
**Amendments.** — This section was amended by two 2005 acts which appear to be compatible and have been compiled together.  
The 2005 amendments by both ch. 25, § 75 and ch. 391, § 4 corrected citations throughout the section.  
**Effective Dates.** — Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45

and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.  
Section 6 of S.L. 1992, ch. 341 read: “The amendments to Section 16-1513, Idaho Code, made by this act shall be in full force and effect on and after July 1, 1992, and shall be in addition to and shall not negate the amendments to Section 16-1513, Idaho Code, made by Section 9, ch. 213, Laws of 1990, which shall be in full force and effect on and after July 1, 1993.”

JUDICIAL DECISIONS

ANALYSIS

Application.  
Intent.

**Application.**  
Section 7-1101 et seq. and this section are mutually exclusive and the provisions of this section do not apply to paternity actions brought pursuant to § 7-1101 et seq. *Burch v. Hearn*, 116 Idaho 956, 782 P.2d 1238 (1989).  
It was error to terminate a biological father’s parental rights based on his failure to file and register his notice of commencement of paternity proceedings under § 16-1513, because the father and mother had filled out and had notarized a paternity affidavit requesting that he be listed as the father on the child’s birth certificate; it was, therefore, unnecessary for him to file a paternity action; he was the biological father of the child and, pursuant to § 16-2007, he was entitled to have had notice of the termination hearing. *Roe Family Servs. v. Doe (In re Baby Boy Doe)*, 139 Idaho 930, 88 P.3d 749 (2004).  
In circumstances where the father and the mother both acknowledge who the biological father is and the father is willing to accept the

rights and responsibilities of paternity, the provisions of §§ 16-2007 and 16-1505 apply; if, on the other hand, the mother does not join in the acknowledgment of paternity, then the father is required to follow the mandates of § 16-1513 and file proceedings for paternity and a notice with the bureau of vital records and health statistics. *Roe Family Servs. v. Doe (In re Baby Boy Doe)*, 139 Idaho 930, 88 P.3d 749 (2004).  
**Intent.**  
Subsection (3) of this section was never intended to prevent a father from voluntarily coming forward and, in the absence of an adoption or termination proceeding, filing an action under § 7-1101 et seq. to establish his rights and obligations with regard to the child, without first having filed and registered the notice of claim to paternity required by subsection (3) of this section. *Burch v. Hearn*, 116 Idaho 956, 782 P.2d 1238 (1989).  
**Cited in:** *Johnson v. Studley-Preston*, 119 Idaho 1055, 812 P.2d 1216 (1991).

**16-1514. Petition for adoption of foreign born child.** — (1) Proceedings to adopt a foreign born child who has been allowed to enter the United States for the purpose of adoption shall be commenced by the filing of a petition under this section. A petition under this section shall be initiated by the person or persons proposing to adopt the child and shall be filed with the district court of the judicial district in which said person or persons reside. The petitioner shall have resided and maintained a dwelling



within the state of Idaho for at least six (6) consecutive months prior to the filing of a petition. The petition shall set forth the following:

- (a) The name and address of the petitioner or petitioners;
- (b) The name of the child proposed to be adopted and the name by which he or she shall be known when adopted;
- (c) The degree of relationship of the child, if any, to the petitioner or petitioners;
- (d) The child's country of origin, and date of birth, if known;
- (e) That the child has been issued a visa or other document authorizing entry into the United States as an immigrant or for the purpose of adoption or for humanitarian reasons relating to adoption in the United States and the date of the person's entry into the United States;
- (f) That a home study of the petitioner or petitioners was prepared and the name of the person or agency performing the home study. A copy of the home study shall be attached to the petition;
- (g) That, to the information and belief of the petitioners, the biological parents of the child to be adopted are residents of another country;
- (h) That the adoption of such child is in the child's best interests.

(2) At the time fixed for the hearing on a petition for adoption under this section, the person or persons adopting the child and the child to be adopted must appear before the court where the petition was filed. The judge shall examine the petitioner or petitioners at the hearing and, if satisfied that the proposed adoption is in the best interests of the child to be adopted, shall enter a decree of adoption. The petitioner or petitioners shall at such time execute an agreement to the effect that the child shall be adopted and treated in all respects as the petitioner's own lawful child.

(3) This section governs the adoption of all foreign born children who have entered the United States to be adopted. Notwithstanding any other provision of this chapter, no consent shall be required from the biological parents of the child to be adopted if the child has been granted permission by the United States department of state or United States department of homeland security to enter the United States for the purpose of adoption or for humanitarian reasons relating to adoption by United States citizens. A visa or other document from the United States department of state or United States department of homeland security authorizing entry into the United States for the purpose of adoption, or for humanitarian reasons relating to adoption by United States citizens, shall be deemed conclusive evidence of the termination of the parental rights of the biological parents and compliance with the laws of the country of the child's birth. The provisions of chapter 20, title 16, Idaho Code, shall not apply to adoptions under this section.

(4) The decisions and orders of foreign courts and government agencies, authorized to approve adoptions, shall be accorded judicial comity or the same full faith and credit accorded a judgment of a sister state without additional proceedings or documentation, provided the United States department of state or United States department of homeland security has allowed the child to enter the United States as set forth in subsection (3) of this section. [I.C., § 16-1514, as added by 1996, ch. 188, § 2, p. 595; am. 1998, ch. 313, § 1, p. 1034; am. 2006, ch. 77, § 1, p. 234.]



## STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 77, rewrote the section heading, which read: “International adoption”; deleted the former second sentence of the introductory paragraph of subsection (1), which read: “Similarly, United States citizen parents who have adopted a child in a foreign country may commence proceedings to have the foreign adoption recognized and granted judicial comity by the filing of a petition under this section”; substituted “homeland security” for “justice, immigration and naturalization service” twice in subsection (3) and once in subsection (4); in subsection (3), deleted “or who have entered the United States as immi-

grants after having been adopted in a foreign country by United States citizens” from the end of the first sentence, “or as an immigrant after having been adopted in a foreign country by United States citizens” at the end of the second sentence, and deleted “or as an immigrant due to adoption in a foreign county by United States citizens” in the third sentence following “United States citizens.”

**Effective Dates.** — Section 3 of S.L. 1996, ch. 188 declared an emergency. Approved March 12, 1996.

Section 2 of S.L. 1998, ch. 313 declared an emergency. Approved March 24, 1998.

**16-1514A. International adoption.** — (1) When an Idaho resident adopts a child in a foreign country in accordance with the laws of the foreign country, and such adoption is recognized as full and final by the United States government, such resident may file with a petition a copy of the decree, order or certificate of adoption which evidences finalization of the adoption in the foreign country, together with a certified translation thereof if it is not in English, and proof of full and final adoption from the United States government with the clerk of the court of any county in this state having jurisdiction over the person or persons filing such documents.

(2) The court shall assign a docket number and file and enter the documents referenced in subsection (1) of this section with an order recognizing the foreign adoption without the necessity of a hearing. Such order, along with the final decree, order or certificate from the foreign country shall have the same force and effect as if a final order of adoption were granted in accordance with the provisions of this chapter.

(3) When such order is filed and entered, the adoptive parents may request a report of adoption as provided in section 39-259, Idaho Code. [I.C., § 16-1514A, as added by 2006, ch. 77, § 2, p. 234.]

**16-1515. Revocation of adoption — Payment of expenses of adoptive parents.** — (1) If a natural parent withdraws or revokes a consent to adoption and the court orders that the custody of the child be returned to the natural parent upon the petition of a natural parent, whether or not the order of adoption has been entered, the court shall order the natural parent who so petitioned to reimburse the adoptive or prospective adoptive parents for all adoption expenses including, but not limited to, all medical fees and costs and all legal fees and costs, and all other reasonable costs and expenses including, but not limited to, expenses for food and clothing incurred by the adoptive or prospective adoptive parents in connection with the care and maintenance of the child while the child was living with the adoptive or prospective adoptive parents. The court shall determine the amount of the reimbursement owing and shall enter the same as a money judgment in favor of the adoptive or prospective adoptive parents.

(2) If the natural parent agrees to consent to the adoption and the adoption proceedings have been initiated by the prospective adoptive

parents in accordance with that agreement but the natural parent thereafter refuses to execute the consent to adoption, the prospective adoptive parents may file a motion for restitution in the adoption action and the court may order reimbursement as provided in subsection (1) of this section, or the prospective adoptive parents may file a suit independent of the adoption proceedings for damages which may include those items described in subsection (1) of this section.

(3) For purposes of this section, "prospective adoptive parents" shall include foster parents who have initiated adoption proceedings with respect to the child for whom foster care is being provided, but shall not include foster parents who are wholly or partially reimbursed by the state of Idaho for the care of the child. [I.C., § 16-1515, as added by 1998, ch. 172, § 1, p. 594.]

## CHAPTER 16

### CHILD PROTECTIVE ACT

#### SECTION.

- 16-1601. Policy.
- 16-1602. Definitions.
- 16-1603. Jurisdiction of the courts.
- 16-1604. Retention of jurisdiction.
- 16-1605. Reporting of abuse, abandonment or neglect.
- 16-1606. Immunity.
- 16-1607. Reporting in bad faith — Civil damages.
- 16-1607A. [Amended and Redesignated.]
- 16-1608. Emergency removal.
- 16-1609. Emergency removal — Notice.
- 16-1609A. [Amended and Redesignated.]
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- 16-1610. Petition.
- 16-1611. Summons.
- 16-1612. Service of summons — Travel expenses — Necessary witnesses.
- 16-1613. Hearings under the child protective act.
- 16-1614. Right to counsel — Guardian ad litem.
- 16-1615. Shelter care hearing.
- 16-1616. Investigation.
- 16-1617. Investigation by multidisciplinary teams.
- 16-1618. Investigative interviews of alleged child abuse victims.
- 16-1619. Adjudicatory hearing — Conduct of hearing — Consolidation.
- 16-1620. Permanency plan — Hearing.

#### SECTION.

- 16-1620A. [Amended and Redesignated.]
- 16-1621. Case plan hearing.
- 16-1622. Review and permanency hearings.
- 16-1623. Amended disposition — Removal during protective supervision.
- 16-1624. Termination of parent-child relationship.
- 16-1625. Appeal — Effect on custody.
- 16-1626. Court records.
- 16-1627. Authorization of emergency medical treatment.
- 16-1628. Support of committed child.
- 16-1629. Powers and duties of the department.
- 16-1630. Other duties of the department — Exceptions.
- 16-1631. Authorization for department to act.
- 16-1632. Guardian ad litem coordinator — Duties — Annual report.
- 16-1633. Guardian ad litem — Duties.
- 16-1634. Guardian ad litem — Rights and powers.
- 16-1635. Immunity from liability.
- 16-1636. Compliance with federal law.
- 16-1637. Exemption.
- 16-1638. Guardian ad litem account — Creation.
- 16-1639. Guardian ad litem grants.
- 16-1640. Administrative Procedure Act.
- 16-1641. Construction.
- 16-1642. Short title.
- 16-1643. Severability.

**16-1601. Policy.** — The policy of the state of Idaho is hereby declared to be the establishment of a legal framework conducive to the judicial processing including periodic review of child abuse, abandonment and neglect cases, and the protection of any child whose life, health or welfare is endangered. At all times the health and safety of the child shall be the

primary concern. Each child coming within the purview of this chapter shall receive, preferably in his own home, the care, guidance and control that will promote his welfare and the best interest of the state of Idaho, and if he is removed from the control of one (1) or more of his parents, guardian or other custodian, the state shall secure adequate care for him; provided, however, that the state of Idaho shall, to the fullest extent possible, seek to preserve, protect, enhance and reunite the family relationship. Nothing in this chapter shall be construed to allow discrimination on the basis of disability. This chapter seeks to coordinate efforts by state and local public agencies, in cooperation with private agencies and organizations, citizens' groups, and concerned individuals, to:

- (1) Preserve the privacy and unity of the family whenever possible;
- (2) Take such actions as may be necessary and feasible to prevent the abuse, neglect, abandonment or homelessness of children;
- (3) Take such actions as may be necessary to provide the child with permanency including concurrent planning;
- (4) Clarify for the purposes of this act the rights and responsibilities of parents with joint legal or joint physical custody of children at risk. [I.C., § 16-1601, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 1, p. 491; am. 1991, ch. 212, § 1, p. 500; am. 1996, ch. 272, § 1, p. 884; am. 1998, ch. 257, § 1, p. 850; am. 2001, ch. 107, § 1, p. 350; am. 2003, ch. 279, § 1, p. 748.]

### STATUTORY NOTES

**Cross References.** — Idaho Juvenile Rules, Rules 1 — 26.

Injury to children as a crime, § 18-1501.

**Prior Laws.** — Former §§ 16-1601 — 16-1623, which comprised S.L. 1919, ch. 161, §§ 1-23, p. 529; C.S., §§ 7902-7924; I.C.A., §§ 31-1201 — 31-1223; 1959, ch. 100, § 1, p. 214, were repealed by S.L. 1963, ch. 321.

Former §§ 16-1624 — 16-1643, which comprised S.L. 1963, ch. 321, §§ 2-17, 20, 21, p. 909; 1969, ch. 31, § 1, p. 55; 1972, ch. 196, § 2, p. 483; 1973, ch. 210, §§ 2, 3, 5, p. 462;

1974, ch. 92, § 1, p. 1191, were repealed S.L. 1976, ch. 204, § 1.

**Compiler's Notes.** — The term "this act", referred to in paragraph (4), was added by S.L. 1996, ch. 272, which is codified as §§ 16-1601 to 16-1603, 16-1609, 16-1610 to 16-1612, 16-1615, 16-1616, 16-1621, 16-1622, 16-1626, 16-1627, 16-1629, 16-1631, 16-1633, 16-1634, and 18-2604. The term should probably read "this chapter", being chapter 16, title 16, Idaho Code.

### JUDICIAL DECISIONS

#### Duty of Department.

Department of health and welfare and a social worker had a duty to competently investigate the report of suspected child abuse, based on the special relationship between the department and abused children, the fact that the department had actual knowledge of the son's abuse, and the fact that the father relied on their statements and conduct. *Rees v. State*, 143 Idaho 10, 137 P.3d 397 (2006).

**Cited in:** *Castro v. State Dep't of Health & Welfare*, 102 Idaho 218, 628 P.2d 1052 (1981); *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982); *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985); *Brown v. State*, 112 Idaho 901, 736 P.2d 1355 (Ct. App. 1987); *State v. Doe*, 133 Idaho 826, 992 P.2d 1226 (Ct. App. 1999); *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000).



## OPINIONS OF ATTORNEY GENERAL

School personnel incur no liability for allowing use of school facilities for purposes of child abuse investigation so long as the reporting was done in good faith and without malice. OAG 93-2.

The department of health and welfare has the authority to investigate reports of suspected child abuse, abandonment and neglect; such authority to investigate extends to school facilities; such investigation should proceed in accordance with governing statutes, the department's promulgated rules, and internal policies. OAG 93-2.

The responsibility of notifying parents of child protective investigations is that of the department of health and welfare and is not

required until such time as the department deems it necessary to ensure that the best interests and needs of the child are met. OAG 93-2.

The standard for state intervention for the medical treatment of children is that intervention is authorized when children are threatened by, or are in, actual harm. The rules of the department of health and welfare regarding the handling of child abuse, neglect and abandonment are neutral toward religious beliefs; the investigation of child abuse and neglect will proceed and determination of neglect will be made based upon the threat of harm to the child, not upon the religious beliefs of the parents. OAG 93-9.

## RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, §§ 115 et seq., 125 et seq.

**A.L.R.** — Physical abuse of child by parent as ground for termination of parent's right to child. 53 A.L.R.3d 605.

Sexual abuse of child by parent as ground for termination of parent's right to child. 58 A.L.R.3d 1074.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding. 79 A.L.R.3d 417.

**16-1602. Definitions.** — For purposes of this chapter:

(1) "Abused" means any case in which a child has been the victim of:

(a) Conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of an accidental occurrence; or

(b) Sexual conduct, including rape, molestation, incest, prostitution, obscene or pornographic photographing, filming or depiction for commercial purposes, or other similar forms of sexual exploitation harming or threatening the child's health or welfare or mental injury to the child.

(2) "Abandoned" means the failure of the parent to maintain a normal parental relationship with his child including, but not limited to, reasonable support or regular personal contact. Failure to maintain this relationship without just cause for a period of one (1) year shall constitute prima facie evidence of abandonment.

(3) "Adaptive equipment" means any piece of equipment or any item that is used to increase, maintain or improve the parenting capabilities of a parent with a disability.

(4) "Adjudicatory hearing" means a hearing to determine:

(a) Whether the child comes under the jurisdiction of the court pursuant to the provisions of this chapter;

(b) Whether continuation of the child in the home would be contrary to the child's welfare and whether the best interests of the child require protective supervision or vesting legal custody of the child in an authorized agency;

(c) Whether aggravated circumstances as defined in section 16-1619, Idaho Code, exist.

(5) "Authorized agency" means the department, a local agency, a person, an organization, corporation, benevolent society or association licensed or approved by the department or the court to receive children for control, care, maintenance or placement.

(6) "Case plan hearing" means a hearing to:

(a) Review, approve, modify or reject the case plan; and

(b) Review reasonable efforts being made to rehabilitate the family; and

(c) Review reasonable efforts being made to reunify the children with a parent or guardian.

(7) "Child" means an individual who is under the age of eighteen (18) years.

(8) "Circumstances of the child" includes, but is not limited to, the joint legal custody or joint physical custody of the child.

(9) "Commit" means to transfer legal and physical custody.

(10) "Concurrent planning" means a planning model that prepares for and implements different outcomes at the same time.

(11) "Court" means district court or magistrate's division thereof, or if the context requires, a magistrate or judge thereof.

(12) "Custodian" means a person, other than a parent or legal guardian, to whom legal or joint legal custody of the child has been given by court order.

(13) "Department" means the department of health and welfare and its authorized representatives.

(14) "Disability" means, with respect to an individual, any mental or physical impairment which substantially limits one (1) or more major life activity of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning or working, or a record of such an impairment, or being regarded as having such an impairment. Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania or pyromania. Sexual preference or orientation is not considered an impairment or disability. Whether an impairment substantially limits a major life activity shall be determined without consideration of the effect of corrective or mitigating measures used to reduce the effects of the impairment.

(15) "Family or household member" shall have the same meaning as in section 39-6303(6), Idaho Code.

(16) "Foster care" means twenty-four (24) hour substitute care for children placed away from their parents or guardians and for whom the state agency has placement and care responsibility.

(17) "Grant administrator" means the supreme court or any organization or agency as may be designated by the supreme court in accordance with

such procedures as may be adopted by the supreme court. The grant administrator shall administer funds from the guardian ad litem account in accordance with the provisions of this chapter.

(18) "Guardian ad litem" means a person appointed by the court pursuant to a guardian ad litem volunteer program to act as special advocate for a child under this chapter.

(19) "Guardian ad litem coordinator" means a person or entity receiving moneys from the grant administrator for the purpose of carrying out any of the duties set forth in section 16-1632, Idaho Code.

(20) "Guardian ad litem program" means the program to recruit, train and coordinate volunteer persons to serve as guardians ad litem for abused, neglected or abandoned children.

(21) "Homeless," as used in this chapter, shall mean that the child is without adequate shelter or other living facilities, and the lack of such shelter or other living facilities poses a threat to the health, safety or well-being of the child.

(22) "Law enforcement agency" means a city police department, the prosecuting attorney of any county, state law enforcement officers, or the office of a sheriff of any county.

(23) "Legal custody" means a relationship created by court order, which vests in a custodian the following rights and responsibilities:

(a) To have physical custody and control of the child, and to determine where and with whom the child shall live.

(b) To supply the child with food, clothing, shelter and incidental necessities.

(c) To provide the child with care, education and discipline.

(d) To authorize ordinary medical, dental, psychiatric, psychological, or other remedial care and treatment for the child, including care and treatment in a facility with a program of services for children; and to authorize surgery if the surgery is deemed by two (2) physicians licensed to practice in this state to be necessary for the child.

(e) Where the parents share legal custody, the custodian may be vested with the custody previously held by either or both parents.

(24) "Mental injury" means a substantial impairment in the intellectual or psychological ability of a child to function within a normal range of performance and/or behavior, for short or long terms.

(25) "Neglected" means a child:

(a) Who is without proper parental care and control, or subsistence, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them; however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being, but this subsection shall not prevent the court from acting pursuant to section 16-1627, Idaho Code; or

(b) Whose parents, guardian or other custodian are unable to discharge their responsibilities to and for the child and, as a result of such inability,



the child lacks the parental care necessary for his health, safety or well-being; or

(c) Who has been placed for care or adoption in violation of law; or

(d) Who is without proper education because of the failure to comply with section 33-202, Idaho Code.

(26) "Permanency hearing" means a hearing to review, approve, reject or modify the permanency plan of the department, and review reasonable efforts in accomplishing the permanency plan.

(27) "Permanency plan" means a plan for a continuous residence and maintenance of nurturing relationships during the child's minority.

(28) "Protective order" means an order created by the court granting relief as delineated in section 39-6306, Idaho Code, and shall be for a period not to exceed three (3) months unless otherwise stated herein. Failure to comply with the order shall be a misdemeanor.

(29) "Protective supervision" means a legal status created by court order in neglect and abuse cases whereby the child is permitted to remain in his home under supervision by the department.

(30) "Residual parental rights and responsibilities" means those rights and responsibilities remaining with the parents after the transfer of legal custody including, but not necessarily limited to, the right of visitation, the right to consent to adoption, the right to determine religious affiliation, the right to family counseling when beneficial, and the responsibility for support.

(31) "Shelter care" means places designated by the department for temporary care of children pending court disposition or placement.

(32) "Supportive services," as used in this chapter, shall mean services which assist parents with a disability to compensate for those aspects of their disability which affect their ability to care for their child and which will enable them to discharge their parental responsibilities. The term includes specialized or adapted training, evaluations or assistance with effectively using adaptive equipment and accommodations which allow parents with a disability to benefit from other services including, but not limited to, Braille texts or sign language interpreters. [I.C., § 16-1602, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 2, p. 491; am. 1986, ch. 84, § 5, p. 243; am. 1989, ch. 281, § 1, p. 684; am. 1989, ch. 302, § 1, p. 752; am. 1991, ch. 38, § 1, p. 76; am. 1991, ch. 212, § 2, p. 500; am. 1996, ch. 272, § 2, p. 884; am. 2000, ch. 136, § 3, p. 355; am. 2001, ch. 107, § 2, p. 350; am. 2003, ch. 279, § 2, p. 748; am. 2005, ch. 391, § 5, p. 1263; am. 2007, ch. 26, § 1, p. 48; am. 2009, ch. 103, § 1, p. 316.]

#### STATUTORY NOTES

**Cross References.** — Department of environmental quality, § 33-104.

Guardian and conservator account, § 16-1638.

Guardians of minors, § 15-5-201.

"Incapacitated person" defined, § 15-5-101.

Penalty for misdemeanor where none prescribed, § 18-317.

Prosecuting attorneys, § 31-2604 et seq.

Sheriffs, § 31-2201 et seq.

**Prior Laws.** — Former § 16-1602 has been repealed, see Prior Laws, § 16-1601.

**Amendments.** — The 2007 amendment, by ch. 26, deleted former subsection (8), defining "Child advocate coordinator" and redesignated subsections accordingly; in subsection (17), substituted "the supreme court or any organization or agency as may be designated by the supreme court in accordance with such

procedures as may be adopted by the supreme court. The grant administrator shall administer" for "any such organization or agency as may be designated by the supreme court from time to time to administer"; and added subsection (19).

The 2009 amendment, by ch. 103, in subsection (25)(a), deleted "education" preceding "medical or other care"; and added subsection (25)(d).

**Legislative Intent.** — Section 4 of S.L. 2000, ch. 136 provides: "In enacting this legislation it is the intent of the Legislature to recognize the rights of parents to provide protection for their minor children. No other intent is expressed or implied."

**Effective Dates.** — Section 6 of S.L. 1986, ch. 84 declared an emergency. Approved March 22, 1986.

## JUDICIAL DECISIONS

### ANALYSIS

Application.

Chronic abuse.

#### Application.

Where charges of lewd conduct with a minor were dismissed upon conditions set out in an agreement between defendant and victim's mother and one of the conditions provided that, if defendant sexually abused victim again, the state could take legal action "under the Child Protective Act and/or appropriate criminal statutes," the court properly applied the definition of sexual abuse found in this section, rather than the definition contained in § 18-1506, to the agreement. State v. Claxton, 128 Idaho 782, 918 P.2d 1227 (Ct. App. 1996).

#### Chronic Abuse.

Evidence clearly supported a magistrate's

finding that a father had subjected his youngest child to chronic abuse where it showed that the child had been deprived of food for a sufficiently long period of time that his height and weight were well below the third percentile, he had muscle wasting and was very weak, he lacked subcutaneous tissue, and his abdomen was protruding, and a pediatrician had testified that it would have taken about five months for a healthy child to reach that condition. Doe v. State, 144 Idaho 420, 163 P.3d 209 (2007).

**Cited in:** Roe v. State, 134 Idaho 760, 9 P.3d 1226 (2000).

### DECISIONS UNDER PRIOR LAW

#### Abandonment.

Evidence that a father, after a divorce in which custody of his children was awarded to his wife and after the wife's remarriage and removal to the state of Connecticut, failed to make substantial contribution to their support, to visit them, or to make sufficient inquiry of their whereabouts was sufficient to support a finding that such father had abandoned his children. Clark v. Jelinek, 90 Idaho

592, 414 P.2d 892 (1966).

Definition of "abandoned" in former law supported trial court's finding of abandonment where the father did not contact the children for 28 months, made no support payments although financially able and where the wife did not know his whereabouts for 16 months. In re Ewing, 96 Idaho 424, 529 P.2d 1296 (1974).

## OPINIONS OF ATTORNEY GENERAL

Neither the express language of Idaho's religious exemption nor traditional constitutional principles of religious freedom limit administrative or judicial authority to provide medical services to children. OAG 93-9.

The standard for state intervention for the medical treatment of children is that intervention is authorized when children are threatened by, or are in, actual harm. The

rules of the department of health and welfare regarding the handling of child abuse, neglect and abandonment are neutral toward religious beliefs; the investigation of child abuse and neglect will proceed and determination of neglect will be made based upon the threat of harm to the child, not upon the religious beliefs of the parents. OAG 93-9.

**16-1603. Jurisdiction of the courts.** — (1) Except as otherwise provided herein, the court shall have exclusive original jurisdiction in all proceedings under this chapter concerning any child living or found within the state:

- (a) Who is neglected, abused or abandoned by his parents, guardian or other legal custodian, or who is homeless; or
- (b) Whose parents or other legal custodian fails to provide a stable home environment.

(2) If the court has taken jurisdiction over a child under subsection (1) of this section, it may take jurisdiction over another child living or having custodial visitation in the same household without the filing of a separate petition if it finds all of the following:

- (a) The other child is living or is found within the state;
- (b) The other child has been exposed to or is at risk of being a victim of abuse, neglect or abandonment;
- (c) The other child is listed in the petition or amended petition;
- (d) The parents or legal guardians of the other child have notice as provided in section 16-1611, Idaho Code. [I.C., § 16-1603, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 3, p. 491; am. 1991, ch. 212, § 3, p. 500; am. 1996, ch. 272, § 3, p. 884; am. 1999, ch. 123, § 2, p. 360; am. 2001, ch. 107, § 3, p. 350; am. 2003, ch. 279, § 3, p. 748; am. 2005, ch. 391, § 6, p. 1263.]

STATUTORY NOTES

**Prior Laws.** — Former § 16-1603 has been repealed, see Prior Laws, § 16-1601.

JUDICIAL DECISIONS

**Cited in:** Ortiz v. State, Dep’t of Health & Welfare, 113 Idaho 682, 747 P.2d 91 (Ct. App. 1987); Doe v. State (In re Doe), 145 Idaho 650, 182 P.3d 707 (2008).

OPINIONS OF ATTORNEY GENERAL

The child protective act may be available as a means of addressing situations in which a child is not attending a public school. OAG 83-12.

Idaho’s child protective act could be amended by the Idaho Legislature to provide specific legal rights and protections for the unborn, as the state does have a compelling

interest in protecting potential human life from gestational drug abuse, but the act presently would not permit the state to intervene in the case of gestational drug abuse in order to protect the fetus and an action brought under the child protective act would in all likelihood be dismissed for lack of jurisdiction. OAG 91-1.

**16-1604. Retention of jurisdiction.** — (1) Jurisdiction obtained by the court under this chapter shall be retained until the child’s eighteenth birthday, unless terminated prior thereto. Jurisdiction of the court shall not be terminated by an order of termination of parental rights if guardianship and/or custody of the child is placed with the department of health and welfare.

(2) The parties have an ongoing duty to inquire concerning, and inform the court as soon as possible about, any other pending actions or current



orders involving the child. In the event there are conflicting orders from Idaho courts concerning the child, the child protection order is controlling. [I.C., § 16-1604, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 4, p. 491; am. 1989, ch. 218, § 1, p. 527; am. 2001, ch. 107, § 4, p. 350.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 16-1604 has been repealed, see Prior Laws, § 16-1601.

#### JUDICIAL DECISIONS

**Cited in:** State v. Powell, 120 Idaho 707, 819 P.2d 561 (1991).

**16-1605. Reporting of abuse, abandonment or neglect.** — (1) Any physician, resident on a hospital staff, intern, nurse, coroner, school teacher, day care personnel, social worker, or other person having reason to believe that a child under the age of eighteen (18) years has been abused, abandoned or neglected or who observes the child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment or neglect shall report or cause to be reported within twenty-four (24) hours such conditions or circumstances to the proper law enforcement agency or the department. The department shall be informed by law enforcement of any report made directly to it. When the attendance of a physician, resident, intern, nurse, day care worker, or social worker is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the necessary reports.

(2) For purposes of subsection (3) of this section the term “duly ordained minister of religion” means a person who has been ordained or set apart, in accordance with the ceremonial, ritual or discipline of a church or religious organization which has been established on the basis of a community of religious faith, belief, doctrines and practices, to hear confessions and confidential communications in accordance with the bona fide doctrines or discipline of that church or religious organization.

(3) The notification requirements of subsection (1) of this section do not apply to a duly ordained minister of religion, with regard to any confession or confidential communication made to him in his ecclesiastical capacity in the course of discipline enjoined by the church to which he belongs if:

- (a) The church qualifies as tax-exempt under 26 U.S.C. section 501(c)(3);
- (b) The confession or confidential communication was made directly to the duly ordained minister of religion; and
- (c) The confession or confidential communication was made in the manner and context which places the duly ordained minister of religion specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine. A confession or confidential communication made under any other circumstances does not fall under this exemption.

(4) Failure to report as required in this section shall be a misdemeanor. [I.C., § 16-1619, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 18, p. 491; am. 1985, ch. 158, § 1, p. 416; am. 1995, ch. 329, § 1, p. 1098; am. and redesign. 2005, ch. 391, § 7, p. 1263.]

STATUTORY NOTES

<p><b>Cross References.</b> — Penalty for misdemeanor where none prescribed, § 18-317.</p> <p><b>Prior Laws.</b> — Another former § 16-1605 has been repealed, see Prior Laws, § 16-1601.</p> <p><b>Compiler's Notes.</b> — This section was</p>	<p>formerly compiled as § 16-1619.</p> <p>Former § 16-1605 was amended and redesignated as § 16-1610 by S.L. 2005, ch. 391, § 12.</p>
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OPINIONS OF ATTORNEY GENERAL

<p>School personnel must report all instances of suspected child abuse, abandonment and neglect to either law enforcement or the department of health and welfare within 24 hours of discovery. Failure to do so is a misdemeanor. OAG 93-2.</p>	<p>The religious exemption provision of this act does not affect the normal reporting and investigation provision for suspected child abuse, neglect and abandonment of this section. OAG 93-9.</p>
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**16-1606. Immunity.** — Any person who has reason to believe that a child has been abused, abandoned or neglected and, acting upon that belief, makes a report of abuse, abandonment or neglect as required in section 16-1605, Idaho Code, shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any such judicial proceeding resulting from such report. Any person who reports in bad faith or with malice shall not be protected by this section. Any privilege between husband and wife, or between any professional person except the lawyer-client privilege, including but not limited to physicians, counselors, hospitals, clinics, day care centers and schools and their clients shall not be grounds for excluding evidence at any proceeding regarding the abuse, abandonment or neglect of the child or the cause thereof. [I.C., § 16-1620, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 19, p. 491; am. 1985, ch. 158, § 2, p. 416; am. 1995, ch. 328, § 1, p. 1097; am. and redesign. 2005, ch. 391, § 8, p. 1263.]

STATUTORY NOTES

<p><b>Prior Laws.</b> — Another former § 16-1606 has been repealed, see Prior Laws, § 16-1601.</p> <p><b>Compiler's Notes.</b> — This section was formerly compiled as § 16-1620.</p>	<p>Former § 16-1606 was amended and redesignated as § 16-1611 by S.L. 2005, ch. 391, § 13.</p>
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OPINIONS OF ATTORNEY GENERAL

<p>School personnel incur no liability for allowing use of school facilities for purposes of child abuse investigation, so long as the re-</p>	<p>porting was done in good faith and without malice. OAG 93-2.</p>
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**16-1607. Reporting in bad faith — Civil damages.** — Any person who makes a report or allegation of child abuse, abandonment or neglect

knowing the same to be false or who reports or alleges the same in bad faith or with malice shall be liable to the party or parties against whom the report was made for the amount of actual damages sustained or statutory damages of two thousand five hundred dollars (\$2,500), whichever is greater, plus attorney's fees and costs of suit. If the court finds that the defendant acted with malice or oppression, the court may award treble actual damages or treble statutory damages, whichever is greater. [I.C., § 16-1620A, as added by 1995, ch. 276, § 1, p. 924; am. and redesisg. 2005, ch. 391, § 9, p. 1263; am. 2007, ch. 128, § 1, p. 385.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1607 has been repealed, see Prior Laws, § 16-1601.

**Amendments.** — The 2007 amendment, by ch. 128, substituted “two thousand five hundred dollars (\$2,500)” for “five hundred dollars (\$500).”

**Compiler's Notes.** — This section was formerly compiled as § 16-1620A.

Former § 16-1607 was amended and redesignated as § 16-1612 by S.L. 2005, ch. 391, § 14.

#### 16-1607A. [Amended and Redesignated.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section is amended and redesignated as § 16-1613 by S.L. 2005, ch. 391, § 15.

#### 16-1608. Emergency removal. —

(1)(a) A child may be taken into shelter care by a peace officer without an order issued pursuant to subsection (4) of section 16-1611 or section 16-1619, Idaho Code, only where the child is endangered in his surroundings and prompt removal is necessary to prevent serious physical or mental injury to the child or where the child is an abandoned child pursuant to the provisions of chapter 82, title 39, Idaho Code.

(b) An alleged offender may be removed from the home of the victim of abuse or neglect by a peace officer without an order, issued pursuant to subsection (5) of section 16-1611, Idaho Code, only where the child is endangered and prompt removal of an alleged offender is necessary to prevent serious physical or mental injury to the child.

(2) When a child is taken into shelter care under subsection (1) of this section, he may be held for a maximum of forty-eight (48) hours, excluding Saturdays, Sundays and holidays, unless a shelter care hearing has been held pursuant to section 16-1615, Idaho Code, and the court orders an adjudicatory hearing.

(3) When an alleged offender is removed from the home under subsection (1)(b) of this section, a motion based on a sworn affidavit by the department must be filed simultaneously with the petition and the court shall determine at a shelter care hearing, held within a maximum of twenty-four (24) hours, excluding Saturdays, Sundays and holidays, whether the relief sought shall be granted, pending an adjudicatory hearing. Notice of such hearing shall be served upon the alleged offender at the time of removal or other protective



relief. [I.C., § 16-1612, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 12, p. 491; am. 1989, ch. 302, § 4, p. 752; am. 2001, ch. 107, § 13, p. 350; am. 2001, ch. 357, § 3, p. 1252; am. and redesisg. 2005, ch. 25, § 76, p. 82; am. and redesisg. 2005, ch. 391, § 10, p. 1263.]

### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1608 has been repealed, see Prior Laws, § 16-1601.

**Amendments.** — This section was amended by two 2001 acts which appear to be compatible and have been compiled together.

The 2001 amendment by ch. 107, § 13, changed the section head to read “Emergency removal”; in subsection (a)(1) substituted “shelter care” for “custody” and “16-1608” for “16-1610”; and in subsection (b) substituted “shelter care” for “custody.”

The 2001 amendment by ch. 357, § 3, in subsection (a)(1) added the language “or where the child is an abandoned child pursuant to the provision of chapter 81, title 39, Idaho Code”

This section was amended by two 2005 acts which appear to be compatible and have been compiled together.

The 2005 amendment, by ch. 25, § 76, corrected a reference in paragraph (1)(a).

The 2005 amendment, by ch. 391, § 10, made the same correction as ch. 25, § 76, renumbered the section from § 16-1612, and made additional citation changes.

**Compiler’s Notes.** — This section was formerly compiled as § 16-1612.

Former § 16-1608 was amended and redesignated as § 16-1619 by S.L. 2005, ch. 391, § 21.

**16-1609. Emergency removal — Notice.** — (1) A peace officer who takes a child into shelter care under section 16-1608, Idaho Code, shall immediately:

- (a) Take the child to a place of shelter; and
- (b) Notify the court of the action taken and the place to which the child was taken; and
- (c) With the exception of a child abandoned pursuant to the provisions of chapter 82, title 39, Idaho Code, notify each of the parents, guardian or other legal custodian that the child has been taken into shelter care, the type and nature of shelter care, and that the child may be held for a maximum of forty-eight (48) hours, excluding Saturdays, Sundays and holidays, within which time there must be a shelter care hearing.

(2) A peace officer who takes a child into shelter care under section 16-1608, Idaho Code, shall not be held liable either criminally or civilly unless the action of taking the child was exercised in bad faith and/or the requirements of subsection (1) of this section are not complied with. [I.C., § 16-1613, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 13, p. 491; am. 1996, ch. 272, § 10, p. 884; am. 2001, ch. 107, § 14, p. 350; am. 2001, ch. 357, § 4, p. 1252; am. and redesisg. 2005, ch. 25, § 77, p. 82; am. and redesisg. 2005, ch. 391, § 11, p. 1263.]

### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1609 has been repealed, see Prior Laws, § 16-1601.

**Amendments.** — This section was amended by two 2001 act which appear to be compatible and have been compiled together.

The 2001 amendment by ch. 107, § 14, changed the head to read “Emergency Removal — Notice.”; in subsection (a), substi-

tuted “shelter care” for “custody”; in subsection (a)(3), substituted “shelter care” for “custody”; in subsection (b), substituted “shelter care” for “custody”; and made minor stylistic changes.

The 2001 amendment by ch. 357, § 4, in subsection (a)(3) added “with the exception of a child abandoned pursuant to the provisions

of chapter 81, title 39, Idaho Code.”

This section was amended by two 2005 acts which appear to be compatible and have been compiled together.

The 2005 amendment, by ch. 25, corrected a reference in paragraph (1)(c).

The 2005 amendment, by ch. 391, made the same correction as ch. 25, renumbered the

section from § 16-1613, and made additional stylistic and citation changes.

**Compiler’s Notes.** — This section was formerly compiled as § 16-1613.

Former § 16-1609 was amended and redesignated as § 16-1616 by S.L. 2005, ch. 391, § 18.

## **16-1609A. [Amended and Redesignated.]**

### **STATUTORY NOTES**

**Compiler’s Notes.** — This section is amended and redesignated as § 16-1617 by S.L. 2005, ch. 391, § 19.

## **16-1609B. [Amended and Redesignated.]**

### **STATUTORY NOTES**

**Compiler’s Notes.** — This section is amended and redesignated as § 16-1618 by S.L. 2005, ch. 391, § 20.

**16-1610. Petition.** — (1) A petition invoking the jurisdiction of the court under this chapter shall be filed in the manner provided in this section:

(a) A petition must be signed by the prosecutor or deputy attorney general before being filed with the court.

(b) Any person or governmental body of this state having evidence of abuse, abandonment, neglect or homelessness of a child may request the attorney general or prosecuting attorney to file a petition. The prosecuting attorney or the attorney general may file a petition on behalf of any child whose parent, guardian, or custodian has been accused in a criminal complaint of the crime of cruel treatment or neglect as defined in section 18-1501, Idaho Code.

(2) Petitions shall be entitled “In the Matter of ....., a child under the age of eighteen (18) years” and shall be verified and set forth with specificity:

(a) The facts which bring the child within the jurisdiction of the court upon the grounds set forth in section 16-1603, Idaho Code, with the actions of each parent described therein;

(b) The name, birthdate, sex, and residence address of the child;

(c) The name, birthdate, sex, and residence address of all other children living at or having custodial visitation at the home where the injury to the subject child occurred;

(d) The names and residence addresses of both the mother and father, guardian or other custodian. If neither of his parents, guardian or other custodian resides or can be found within the state, or if their residence addresses are unknown, the name of any known adult relative residing within the state;

- (e) The names and residence addresses of each person having sole or joint legal custody of the children described in this section;
  - (f) Whether or not there exists a legal document including, but not limited to, a divorce decree, stipulation or parenting agreement controlling the custodial status of the children described in this section;
  - (g) Whether the child is in shelter care, and, if so, the type and nature of the shelter care, the circumstances necessitating such care and the date and time he was placed in such care;
  - (h) When any of the facts required by this section cannot be determined, the petition shall so state. The petition may be based on information and belief but in such case the petition shall state the basis of such information and belief;
  - (i) If the child has been or will be removed from the home, the petition shall state that:
    - (i) Remaining in the home was contrary to the welfare of the child; and
    - (ii) Vesting legal custody of the child in the department or other authorized agency is in the best interests of the child; and
    - (iii) Reasonable efforts have been made prior to the placement of the child in care to prevent the removal of the child from his home or, if such efforts were not provided, that reasonable efforts to prevent placement were not required as the parent subjected the child to aggravated circumstances;
  - (j) The petition shall state with specificity whether a parent with joint legal custody or a noncustodial parent has been notified of placement;
  - (k) The petition shall state whether a court has adjudicated the custodial rights of the parents and shall set forth the custodial status of the child;
  - (l) The court may combine petitions and hearings where multiple petitions have been filed involving related children, parents or guardians.
- [I.C., § 16-1605, as added by 1976, ch. 204, § 2, p. 732; am. 1977, ch. 304, § 1, p. 852; am. 1982, ch. 186, § 5, p. 491; am. 1986, ch. 121, § 1, p. 319; am. 1996, ch. 272, § 4, p. 884; am. 1998, ch. 257, § 2, p. 850; am. 2001, ch. 107, § 5, p. 350; am. and redesign. 2005, ch. 391, § 12, p. 1263.]

### STATUTORY NOTES

<p><b>Prior Laws.</b> — Another former § 16-1610 has been repealed, see Prior Laws, § 16-1601.</p> <p><b>Compiler's Notes.</b> — This section was formerly compiled as § 16-1605.</p>	<p>Former § 16-1610 was amended and redesignated as § 16-1621 by S.L. 2005, ch. 391, § 23.</p>
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### JUDICIAL DECISIONS

**Cited in:** *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000).

**16-1611. Summons.** — (1) After a petition has been filed, the clerk of the court may issue a summons requiring the person or persons who have custody of the child to bring the child before the court at the adjudicatory hearing held in accordance with section 16-1619, Idaho Code. Each parent or guardian shall also be notified in the manner hereinafter provided of the



pendency of the case and the time and place set for the hearing. A summons shall be issued and served requiring the appearance of each parent and legal guardian, and a summons may be issued and served for any other person whose presence is required by the child, either of his parents or guardian or any other person whose presence, in the opinion of the court, is necessary.

(2) A copy of the petition shall be attached to each summons.

(3) The summons shall notify each of the parents, guardian or legal custodian of their right to retain and be represented by counsel. Each parent or legal guardian of each child named in the petition shall be notified by the court of the case and of the time and place set for the hearing.

(4) If based on facts presented to the court, it appears that the court has jurisdiction upon the grounds set forth in section 16-1603, Idaho Code, and the court finds that the child should be removed from his present condition or surroundings because continuation in such condition or surroundings would be contrary to the welfare of the child and vesting legal custody with the department or other authorized agency would be in the child's best interests, the court shall include on the summons an order to remove the child. The order to remove the child shall specifically state that continuation in the present condition or surroundings is contrary to the welfare of the child and shall require a peace officer or other suitable person to take the child at once to a place of shelter care designated by the authorized agency which shall provide shelter care for the child.

(5) If it appears that the child is safe in his present condition or surroundings and it is not in his best interest to remove him at this time, the court may issue a protective order based on an affidavit pending the adjudicatory hearing. If the child is in joint custody, the protective order shall state with specificity the rights and responsibilities of each parent. Each parent shall be provided with a copy of the protective order. [I.C., § 16-1606, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 6, p. 491; am. 1989, ch. 302, § 2, p. 752; am. 1996, ch. 272, § 5, p. 884; am. 2001, ch. 107, § 6, p. 350; am. and redesign. 2005, ch. 391, § 13, p. 1263; am. 2007, ch. 223, § 1, p. 669.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1611 has been repealed, see Prior Laws, § 16-1601.

**Amendments.** — The 2007 amendment, by ch. 223, in subsection (4), in the first sentence, inserted "the court finds," and substituted "the court shall include on the summons an order to remove the child" for "the court may so order by endorsement upon the

summons," and in the last sentence, substituted "order to remove the child" for "endorsement."

**Compiler's Notes.** — This section was formerly compiled as § 16-1606.

Former § 16-1611 was amended and redesignated as § 16-1622 by S.L. 2005, ch. 391, § 24.

#### JUDICIAL DECISIONS

**Cited in:** *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000).

**16-1612. Service of summons — Travel expenses — Necessary witnesses.** — (1) Service of summons shall be made personally by delivery

of an attested copy thereof to the person summoned; provided that if the court is satisfied that it is impracticable to serve personally such summons or the notice provided for in the preceding section, he may order service by registered mail addressed to the last known address, or by publication thereof, or both. It shall be sufficient to confer jurisdiction if service is effected at least forty-eight (48) hours before the time fixed in the summons for the hearing.

(2) When publication is used the summons shall be published once a week for two (2) consecutive weeks in a newspaper of general circulation in the county; such newspaper to be designated by the court in the order for publication of the summons, and such publication shall have the same force and effect as though such person had been personally served with said summons.

(3) Service of summons, process or notice required by this chapter shall be made by the sheriff or other person appointed by the court, and a return must be made on the summons showing that service has been made.

(4) The court may authorize payment of any necessary travel expenses incurred by any person summoned or otherwise required to appear at the hearing of any case coming within the purview of this chapter, and such expenses when approved by the court shall be a charge upon the county, except that not more than five (5) witnesses on behalf of any parent or guardian may be required to attend such hearing at the expense of the county.

(5) The court may summon the appearance of any person whose presence is deemed necessary as a witness.

(6) The child, each of his parents, guardian or custodian shall be notified as soon as practicable after the filing of a petition and prior to the start of a hearing of their right to be represented by counsel.

(7) If any person summoned as herein provided shall, without reasonable cause, fail to appear, the court may proceed in such person's absence or such person may be proceeded against for contempt of court.

(8) Where the summons cannot be served, or the parties served fail to obey the same, or in any case when it shall be made to appear to the court that the service will be ineffectual, or that the welfare of the child requires that he be brought forthwith into the custody of the court, a warrant or *capias* may be issued for the parent, guardian or the child. [I.C., § 16-1607, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 7, p. 491; am. 1996, ch. 272, § 6, p. 884; am. and redesisg. 2005, ch. 391, § 14, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1612 has been repealed, see Prior Laws, § 16-1601.

**Compiler's Notes.** — This section was formerly compiled as § 16-1607.

Former § 16-1612 was amended and redesignated as § 16-1608 by S.L. 2005, ch. 391, § 10.

**16-1613. Hearings under the child protective act.** — (1) Proceedings under this chapter shall be dealt with by the court at hearings separate from those for adults and without a jury. The hearings shall be conducted in

an informal manner and may be adjourned from time to time. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case. The child may be excluded from hearings at any time at the discretion of the court. If the parent or guardian is without counsel, the court shall inform them of their right to be represented by counsel and to appeal from any disposition or order of the court.

(2) When a child is summoned as a witness in any hearing under this act, notwithstanding any other statutory provision, parents, a counselor, a friend, or other person having a supportive relationship with the child shall, if available, be permitted to remain in the courtroom at the witness stand with the child during the child's testimony unless, in written findings made and entered, the court finds that the constitutional right of the child's parent(s), guardian(s) or other custodian(s) to a fair hearing will be unduly prejudiced.

(3) At any stage of a proceeding under this chapter, if the court determines that it is in the best interests of the child or society, the court may cause the proceeding to be expanded or altered to include full or partial consideration of the cause under the juvenile corrections act without terminating the original proceeding under this chapter. [I.C., § 16-1607A, as added by 2001, ch. 107, § 7, p. 350; am. and redesign. 2005, ch. 391, § 15, p. 1263.]

#### STATUTORY NOTES

**Cross References.** — Juvenile corrections act, § 20-501 et seq.

**Prior Laws.** — Another former § 16-1613 has been repealed, see Prior Laws, § 16-1601.

**Compiler's Notes.** — This section was formerly compiled as § 16-1607A.

Former § 16-1613 was amended and redesignated as § 16-1609 by S.L. 2005, ch. 391, § 11.

The term "this act" in subsection (2) was added by S.L. 2001, ch. 107, which is compiled as §§ 16-1601 to 16-1604, 16-1608, 16-1609, 16-1610, 16-1611, 16-1613 to 16-1617, 16-1619, 16-1621, 16-1622, 16-1624, 16-1625, and 16-1629. Probably the reference should be to "this chapter", being chapter 16, title 16, Idaho Code.

**16-1614. Right to counsel — Guardian ad litem.** — (1) In any proceeding under this chapter the court shall appoint a guardian ad litem for the child or children to serve at each stage of the proceeding and in appropriate cases shall appoint counsel to represent the guardian, and in appropriate cases, may appoint separate counsel for the child.

(2) If a court does not have available to it a guardian ad litem program or a sufficient number of guardians ad litem, the court shall appoint separate counsel for the child. For a child under the age of twelve (12) years the attorney will have the powers and duties of a guardian ad litem. For a child twelve (12) years of age or older, the court may order that the counsel act with or without the powers and duties of a guardian ad litem.

(3) Counsel appointed for the child under the provisions of this section shall be paid for by the county unless the party for whom counsel is appointed has an independent estate sufficient to pay such costs. [I.C., § 16-1618, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 17,



p. 491; am. 1985, ch. 177, § 1, p. 459; am. 1989, ch. 281, § 2, p. 684; am. 2001, ch. 107, § 18, p. 350; am. and redesign. 2005, ch. 391, § 16, p. 1263.]

### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1614 has been repealed, see Prior Laws, § 16-1601. Former § 16-1614 was amended and redesignated as § 16-1615 by S.L. 2005, ch. 391, § 17.

**Compiler's Notes.** — This section was formerly compiled as § 16-1618.

### JUDICIAL DECISIONS

**Cited in:** James v. Dunlap, 100 Idaho 697, 604 P.2d 711 (1979).

**16-1615. Shelter care hearing.** — (1) Notwithstanding any other provision of this chapter, when a child is taken into shelter care pursuant to section 16-1608 or 16-1611, Idaho Code, a hearing to determine whether the child should be released shall be held according to the provisions of this section.

(2) Each of the parents or custodian from whom the child was removed shall be given notice of the shelter care hearing. Such notice shall include the time, place, and purpose of the hearing; and, that such person is entitled to be represented by legal counsel. Notice as required by this subsection shall be given at least twenty-four (24) hours before the shelter care hearing.

(3) Notice of the shelter care hearing shall be given to the parents or custodian from whom the child was removed by personal service and the return of service shall be filed with the court and to any person having joint legal or physical custody of the subject child. Provided, however, that such service need not be made where the undelivered notice is returned to the court along with an affidavit stating that such parents or custodian could not be located or were out of the state.

(4) The shelter care hearing may be continued for a reasonable time upon request by the parent, custodian or counsel for the child.

(5) If, upon the completion of the shelter care hearing, it is shown that:

(a) A petition has been filed; and

(b) There is reasonable cause to believe the child comes within the jurisdiction of the court under this chapter and either:

(i) The department made reasonable efforts to eliminate the need for shelter care but the efforts were unsuccessful; or

(ii) The department made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventive services; and

(c) The child could not be placed in the temporary sole custody of a parent having joint legal or physical custody; and

(d) It is contrary to the welfare of the child to remain in the home; and

(e) It is in the best interests of the child to remain in temporary shelter care pending the conclusion of the adjudicatory hearing; or

(f) There is reasonable cause to believe that the child comes within the jurisdiction of the court under this chapter, but a reasonable effort to prevent placement of the child outside the home could be affected by a

protective order safeguarding the child's welfare and maintaining the child in his present surroundings;  
the court shall issue, within twenty-four (24) hours of such hearing, an order of temporary legal custody and/or a protective order. Any evidence may be considered by the court which is of the type which reasonable people may rely upon.

(6) Upon ordering shelter care pursuant to subsection (5) of this section, the court shall also order an adjudicatory hearing to be held as soon as possible, but in no event later than thirty (30) days from the date the petition was filed.

(7) If the court does not find that the child should remain in shelter care under subsection (5) of this section, the child shall be released and the court may dismiss the petition. [I.C., § 16-1614, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 14, p. 491; am. 1986, ch. 121, § 3, p. 319; am. 1989, ch. 58, § 1, p. 92; am. 1989, ch. 302, § 5, p. 752; am. 1996, ch. 272, § 11, p. 884; am. 2001, ch. 107, § 15, p. 350; am. and redesisg. 2005, ch. 391, § 17, p. 1263; am. 2007, ch. 223, § 2, p. 669.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1615 has been repealed, see Prior Laws, § 16-1601.

**Amendments.** — The 2007 amendment, by ch. 223, in subsection (5)(b), deleted "that reasonable efforts to prevent the placement of the child in shelter care could not be provided because of the immediate danger to the child or were provided but were not successful in eliminating the need for foster care placement

of the child" from the end of the introductory paragraph, and added subsections (5)(b)(i) and (ii).

**Compiler's Notes.** — This section was formerly compiled as § 16-1614.

Former § 16-1615 was amended and redesignated as § 16-1624 by S.L. 2005, ch. 391, § 26.

#### JUDICIAL DECISIONS

**Cited in:** *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985).

**16-1616. Investigation.** — (1) After a petition has been filed, the department shall investigate the circumstances of the child and his family and prepare a written report to the court.

(2) The report shall be delivered to the court with copies to each of the parties prior to the pretrial conference for the adjudicatory hearing. If delivered by mail the report must be received by the court and the parties prior to the pretrial conference for the adjudicatory hearing. The report shall contain a social evaluation of the child and the parents or other legal custodian and such other information as the court shall require.

(3) The report shall not be considered by the court for purposes of determining whether the child comes within the jurisdiction of the act. The report may be admitted into evidence at the adjudicatory hearing for other purposes. [I.C., § 16-1609, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 9, p. 491; am. 1996, ch. 272, § 7, p. 884; am. 2001, ch. 107, § 9, p. 350; am. and redesisg. 2005, ch. 391, § 18, p. 1263.]

## STATUTORY NOTES

**Prior Laws.** — Another former § 16-1616 has been repealed, see Prior Laws, § 16-1601.

**Compiler's Notes.** — This section was formerly compiled as § 16-1609.

Former § 16-1616 was amended and redesignated as § 16-1627 by S.L. 2005, ch. 391, § 29.

## JUDICIAL DECISIONS

**Cited in:** *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000).

## OPINIONS OF ATTORNEY GENERAL

Interviews of suspected victims of child abuse, abandonment and neglect without parental consent or notification do not violate the parent's right to privacy in family rela-

tionships and the responsibility of notification is that of the department of health and welfare. OAG 93-2.

**16-1617. Investigation by multidisciplinary teams.** — (1) By January 1, 1997, the prosecuting attorney in each county shall be responsible for the development of an interagency multidisciplinary team or teams for investigation of child abuse and neglect referrals within each county. The teams shall consist of, but not be limited to, law enforcement personnel, department of health and welfare child protection risk assessment staff, a representative of the prosecuting attorney's office, and any other person deemed to be necessary due to his special training in child abuse investigation. Other persons may participate in investigation of particular cases at the invitation of the team and as determined necessary, such as medical personnel, school officials, mental health workers, personnel from domestic violence programs, persons knowledgeable about adaptive equipment and supportive services for parents or guardians with disabilities or the guardian ad litem program.

(2) The teams shall develop a written protocol for investigation of child abuse cases and for interviewing alleged victims of such abuse or neglect, including protocols for investigations involving a family member with a disability. Each team shall develop written agreements signed by member agencies, specifying the role of each agency, procedures to be followed to assess risks to the child and criteria and procedures to be followed to ensure the child victim's safety including removal of the alleged offender.

(3) Each team member shall be trained in risk assessment, dynamics of child abuse and interviewing and investigatory techniques.

(4) Each team shall classify, assess and review a representative selection of cases referred to either the department or to law enforcement entities for investigation of child abuse or neglect.

(5) Each multidisciplinary team shall develop policies that provide for an independent review of investigation procedures utilized in cases upon completion of any court actions on those cases. The procedures shall include independent citizen input. Nonoffending parents of child abuse victims shall be notified of the review procedure.

(6) Prosecuting attorneys of the various counties may determine that multidisciplinary teams may be most effectively established through the use



of joint exercise of powers agreements among more than one (1) county and such agreements are hereby authorized.

(7) Lack of review by a multidisciplinary team of a particular case does not defeat the jurisdiction of the court. [I.C., § 16-1609A, as added by 1996, ch. 388, § 1, p. 1311; am. 2001, ch. 107, § 10, p. 350; am. 2003, ch. 279, § 5, p. 748; am. and redesign. 2005, ch. 391, § 19, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1617 has been repealed, see Prior Laws, § 16-1601.

**Compiler's Notes.** — This section was formerly compiled as § 16-1609A.

Former § 16-1617 was amended and redesignated as § 16-1625 by S.L. 2005, ch. 391, § 27.

#### **16-1618. Investigative interviews of alleged child abuse victims.**

— Unless otherwise demonstrated by good cause, all investigative or risk assessment interviews of alleged victims of child abuse will be documented by audio or video taping whether conducted by personnel of law enforcement entities or the department of health and welfare. The absence of such audio or video taping shall not limit the admissibility of such evidence in any related court proceeding. [I.C., § 16-1609B, as added by 1996, ch. 388, § 2, p. 1311; am. and redesign. 2005, ch. 391, § 20, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1618 was repealed, see Prior Laws, § 16-1601.

**Compiler's Notes.** — This section was formerly compiled as § 16-1609B.

Former § 16-1618 was amended and redesignated as § 16-1614 by S.L. 2005, ch. 391, § 16.

**16-1619. Adjudicatory hearing — Conduct of hearing — Consolidation.** — (1) When a petition has been filed, the court shall set an adjudicatory hearing to be held no later than thirty (30) days after the filing of the petition.

(2) A pretrial conference shall be held outside the presence of the court within three (3) to five (5) days before the adjudicatory hearing. Investigative reports required under section 16-1616, Idaho Code, shall be delivered to the court with copies to each of the parents and other legal custodians, guardian ad litem and attorney for the child prior to the pretrial conference.

(3) At the adjudicatory hearing, parents or guardians with disabilities shall have the right to introduce admissible evidence regarding how use of adaptive equipment or supportive services may enable the parent or guardian to carry out the responsibilities of parenting the child by addressing the reason for the removal of the child.

(4) If a preponderance of the evidence at the adjudicatory hearing shows that the child comes within the court's jurisdiction under this chapter upon the grounds set forth in section 16-1603, Idaho Code, the court shall so decree and in its decree shall make a finding on the record of the facts and conclusions of law upon which it exercises jurisdiction over the child.

(5) Upon entering its decree the court shall consider any information relevant to the disposition of the child but in any event shall:

- (a) Place the child under protective supervision in his own home for an indeterminate period not to exceed the child's eighteenth birthday; or
- (b) Vest legal custody in the department or other authorized agency subject to residual parental rights and subject to full judicial review by the court of all matters relating to the custody of the child by the department or other authorized agency.

(6) If the court vests legal custody in the department or other authorized agency, the court shall make detailed written findings based on facts in the record, that, in addition to the findings required in subsection (4) of this section, continuation of residence in the home would be contrary to the welfare of the child and that vesting legal custody with the department or other authorized agency would be in the best interests of the child. In addition the court shall make detailed written findings based on facts in the record as to whether the department made reasonable efforts to prevent the placement of the child in foster care, including findings, when appropriate, that:

- (a) Reasonable efforts were made but were not successful in eliminating the need for foster care placement of the child;
- (b) The department made reasonable efforts to prevent removal but was not able to safely provide preventive services;
- (c) Reasonable efforts to temporarily place the child with related persons were made but were not successful; or
- (d) Reasonable efforts were not required as the parent had subjected the child to aggravated circumstances as determined by the court including, but not limited to: abandonment; torture; chronic abuse; sexual abuse; committed murder; committed voluntary manslaughter of another child; aided or abetted, attempted, conspired or solicited to commit such a murder or voluntary manslaughter; committed a battery that results in serious bodily injury to a child; or the parental rights of the parent to a sibling of the child have been terminated involuntarily and that as a result, a hearing to determine the permanent future plan for this child will be held within thirty (30) days of this determination.

(7) A decree vesting legal custody in the department shall be binding upon the department and may continue until the child's eighteenth birthday.

(8) A decree vesting legal custody in an authorized agency other than the department shall be for a period of time not to exceed the child's eighteenth birthday, and on such other terms as the court shall state in its decree to be in the best interests of the child and which the court finds to be acceptable to such authorized agency.

(9) In order to preserve the unity of the family system and to ensure the best interests of the child whether issuing an order of protective supervision or an order of legal custody, the court may consider extending or initiating a protective order as part of the decree. The protective order shall be determined as in the best interests of the child and upon a showing of continuing danger to the child. The conditions and terms of the protective order shall be clearly stated in the decree.

(10) If the court does not find that the child comes within the jurisdiction of this chapter pursuant to subsection (4) of this section it shall dismiss the

petition. [I.C., § 16-1608, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 8, p. 491; am. 1988, ch. 280, § 1, p. 911; am. 1989, ch. 377, § 1, p. 946; am. 2001, ch. 107, § 8, p. 350; am. 2003, ch. 279, § 4, p. 748; am. and redesign. 2005, ch. 391, § 21, p. 1263; am. 2007, ch. 223, § 3, p. 669.]

#### STATUTORY NOTES

**Cross References.** — Juvenile Corrections Act, § 20-501 et seq.

**Prior Laws.** — Another former § 16-1619 has been repealed, see Prior Laws, § 16-1601.

**Amendments.** — The 2007 amendment, by ch. 223, in subsection (2), deleted “the date set for” preceding “the pretrial conference” at the end; rewrote subsection (6)(b), which formerly read: “Reasonable efforts were not made because of immediate danger to the

child”; and deleted the last sentence in subsection (7), which read: “The decree shall state that the department shall prepare a written case plan within thirty (30) days of placement.”

**Compiler’s Notes.** — This section was formerly compiled as § 16-1608.

Former § 16-1619 was amended and redesignated as § 16-1605 by S.L. 2005, ch. 391, § 7.

**16-1620. Permanency plan — Hearing.** — (1) After a judicial determination that reasonable efforts to return the child to his home are not required because the parent has subjected the child to aggravated circumstances as set forth in section 16-1619(6)(d), Idaho Code, the department shall prepare a permanency plan. The plan shall set forth reasonable efforts to place the child for adoption, with a legal guardian, or in another approved permanent placement.

(2) Notice of the permanency hearing shall be provided to the parents, legal guardians, guardians ad litem and foster parents, provided however, that foster parents are not thereby made parties to the child protective act action.

(3) When it is in the child’s best interests, the child’s connections to the community, including individuals with a significant relationship to the child, religious organizations and community activities, will be maintained throughout the transition. The plan shall state with specificity the role of the department toward each parent. [I.C., § 16-1620, as added by 2005, ch. 391, § 22, p. 1263.]

#### STATUTORY NOTES

**Cross References.** — Child protective act, § 16-1601 et seq.

**Prior Laws.** — Another former § 16-1620 has been repealed, see Prior Laws, § 16-1601.

**Compiler’s Notes.** — Former § 16-1620 was amended and redesignated as § 16-1606 by S.L. 2005, ch. 391, § 8.

#### 16-1620A. [Amended and Redesignated.]

#### STATUTORY NOTES

**Compiler’s Notes.** — Former § 16-1620A was amended and redesignated as § 16-1607 by S.L. 2005, ch. 391, § 9.

**16-1621. Case plan hearing.** — (1) The department shall prepare a written case plan in every case in which the child is determined to be within



the jurisdiction of the court, including cases in which the parent(s) is incarcerated. The case plan shall be filed with the court no later than sixty (60) days from the date the child was removed from the home or thirty (30) days after the adjudicatory hearing, whichever occurs first. Copies of the case plan shall be delivered to the parents and other legal guardians, the guardian ad litem and attorney for the child. Within five (5) days of filing the plan, the court shall hold a planning hearing to determine whether to adopt, reject or modify the case plan proposed by the department.

(2) Notice of the case plan hearing shall be provided to the parents, legal guardians, guardians ad litem and foster parents. Although foster parents are provided notice of this hearing, they are not parties to the child protective act action.

(3) The case plan shall set forth reasonable efforts which will be made to make it possible for the child to return to his home and shall concurrently include a plan setting forth reasonable efforts to place the child for adoption, with a legal guardian, or in another approved permanent placement. Whenever possible, the child's connections to the community, including individuals with a significant relationship to the child, religious organizations and community activities, will be maintained through the transition. The plan shall state with specificity the role of the department toward each parent.

(4) The case plan, as approved by the court, shall be entered into the record as an order of the court. In the absence of a finding of aggravated circumstances as provided for in section 16-1619(6)(d), Idaho Code, the court's order shall provide that reasonable efforts shall be made to reunify the family in a timely manner in accordance with the case plan or in the alternative to complete the steps necessary to finalize the permanent placement of the child. [I.C., § 16-1610, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 10, p. 491; am. 1986, ch. 121, § 2, p. 319; am. 1989, ch. 218, § 2, p. 752; am. 1989, ch. 302, § 3, p. 527; am. 1991, ch. 212, § 4, p. 500; am. 1996, ch. 272, § 8, p. 884; am. 1998, ch. 257, § 3, p. 850; am. 1998, ch. 385, § 1, p. 1186; am. 2001, ch. 107, § 11, p. 350; am. 2003, ch. 279, § 6, p. 748; am. and redsig. 2005, ch. 391, § 23, p. 1263.]

## STATUTORY NOTES

**Cross References.** — Child protective act, § 16-1601 et seq.

**Prior Laws.** — Another former § 16-1621 has been repealed, see Prior Laws, § 16-1601.

**Amendments.** — This section was amended by two 1998 acts which appear to be compatible and have been compiled together.

The 1998 amendment, by ch. 257, added subdivisions (b)(2)(iv) and (b)(3), in subsection (c), in the first sentence, added "or may concurrently contain reasonable efforts to place the child for adoption or with a legal guardian", and in the last sentence of subsection (c), substituted "permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the state will file a

petition for termination of parental rights, or referred for legal guardianship or, in cases where compelling reasons exist that it would not be in the best interest of the child to terminate parental rights, placed in another permanent living arrangement" for "future status of the child, specifically stating whether the child should return home, continue in foster care for a specified time, be placed for adoption or, due to special needs, be in foster care permanently or long term."

The 1998 amendment, by ch. 385, at the end of subdivision (b)(3), substituted "involuntarily" for "voluntarily."

**Compiler's Notes.** — This section was formerly compiled as § 16-1610.

Former § 16-1621 was amended and reded-

igned as § 16-1626 by S.L. 2005, ch. 391, § 28.

## JUDICIAL DECISIONS

### ANALYSIS

Appellate review.

Effect of decree on criminal charge.

#### Appellate Review.

Where evidence establishing existence of sexual abuse of a young child was sufficient for a reasonable trier of fact to accept it and to rely upon it, the trial court's finding of abuse, based upon such evidence, could not be deemed clearly erroneous. *Ortiz v. State*, Dep't of Health & Welfare, 113 Idaho 682, 747 P.2d 91 (Ct. App. 1987).

#### Effect of Decree on Criminal Charge.

A collateral estoppel did not arise from the circumstance that the very incident which gave rise to the criminal charge for lewd conduct with a minor had earlier been the subject of a Child Protective Act (CPA) proceeding, notwithstanding that the state was a

party to the CPA proceedings which went to a final "judgment," the findings in the CPA hearing did not bar the criminal prosecution on the charge of lewd and lascivious conduct because a conclusion as to whether a particular incident of abuse took place is not essential to the determination of the child's best interests under the CPA and, unlike a criminal prosecution, a CPA proceeding does not have the effect of placing a defendant in jeopardy. *State v. Powell*, 120 Idaho 707, 819 P.2d 561 (1991).

**Cited in:** *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985); *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000).

**16-1622. Review and permanency hearings.** — (1) A motion for revocation or modification of an order issued under section 16-1619, Idaho Code, may be filed by the department or any party; provided that no motion may be filed by the respondents under this section within three (3) months of a prior hearing on care and placement of the child. All persons required to be summoned or notified of the original petition pursuant to section 16-1611, Idaho Code, shall be served with notice of a motion for review of a child's case.

(2) If the motion filed under subsection (1) of this section alleges that the child's best interests are no longer served by carrying out the order issued under section 16-1619, Idaho Code, or the department or other authorized agency has failed to provide adequate care for the child, the court shall hold a hearing on the motion.

(3) A hearing for review of the child's case and permanency plan shall be held no later than six (6) months after entry of the court's order taking jurisdiction under the act, and every six (6) months thereafter, so long as the child is in the custody of the department or authorized agency.

(4) A hearing shall be held to review the permanency plan of the department prior to twelve (12) months from the date the child is removed from the home or the date of the court's order taking jurisdiction under this chapter, whichever occurs first. The court shall review, approve, reject or modify the permanency plan of the department and review progress in accomplishing the permanency plan. This permanency hearing may be combined with the review hearing required under subsection (3) of this section.

(5) The court shall make written case-specific findings whether the department made reasonable efforts to finalize a permanency plan for the child.

(6) The department or authorized agency may move the court at any time to vacate any order placing a child in its custody or under its protective supervision.

(7) The department or any party may move the court requesting relief from the duty imposed on the department pursuant to the provisions of section 16-1629(9), Idaho Code, that it seek termination of parental rights. The court may grant the department's motion if it appears based on compelling reasons in the record that the presumption has been rebutted. [I.C., § 16-1611, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 11, p. 491; am. 1991, ch. 212, § 5, p. 500; am. 1996, ch. 272, § 9, p. 884; am. 2001, ch. 107, § 12, p. 350; am. and redesisg. 2005, ch. 391, § 24, p. 1263; am. 2007, ch. 223, § 4, p. 669.]

### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1622 has been repealed, see Prior Laws, § 16-1601.

**Amendments.** — The 2007 amendment, by ch. 223, rewrote subsection (5), which formerly read: "By order of the court a hearing officer may be appointed to conduct hear-

ings under this section."

**Compiler's Notes.** — This section was formerly compiled as § 16-1611.

Former § 16-1622 was amended and redesignated as § 16-1628 by S.L. 2005, ch. 391, § 30.

**16-1623. Amended disposition — Removal during protective supervision.** — (1) Where the child has been placed under the protective supervision of the department pursuant to section 16-1619, Idaho Code, the child may be removed from his or her home under the following circumstances:

(a) A peace officer may remove the child where the child is endangered in his surroundings and prompt removal is necessary to prevent serious physical or mental injury to the child; or

(b) The court has ordered, based upon facts presented to the court, that the child should be removed from his or her present conditions or surroundings because continuation in such conditions or surroundings would be contrary to the welfare of the child and vesting legal custody in the department or other authorized agency would be in the child's best interests.

(2) Upon removal, the child shall be taken to a place of shelter care.

(3) When a child under protective supervision is removed from his home, a hearing shall be held within forty-eight (48) hours of the child's removal from the home. At the hearing, the court shall determine whether to vest legal custody in the department or other authorized agency pursuant to section 16-1619(5)(b), Idaho Code.

(4) In determining whether to vest legal custody in the department or other authorized agency, the court shall consider any information relevant to the redispotion of the child, and in any event shall make detailed written findings based upon facts in the record as required by section 16-1619(6), Idaho Code.

(5) An order vesting legal custody with the department or other authorized agency under this section shall be treated for all purposes as if such an order had been part of the court's original decree under section 16-1619,



Idaho Code. The department shall prepare a written case plan and the court shall hold a case plan hearing within thirty (30) days pursuant to section 16-1621, Idaho Code.

(6) Each of the parents or legal guardians from whom the child was removed shall be given notice of the redispotion hearing in the same time and manner as required for notice of a shelter care hearing under section 16-1615(2) and (3), Idaho Code.

(7) The redispotion hearing may be continued for a reasonable time upon the request of the parties. [I.C., § 16-1623, as added by 2005, ch. 391, § 25, p. 1623].]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1623 was amended and redesignated as § 16-1629 has been repealed, see Prior Laws, § 16-1601. by S.L. 2005, ch. 391, § 31.

**Compiler's Notes.** — Former § 16-1623

**16-1624. Termination of parent-child relationship.** — If the child has been placed in the legal custody of the department or under its protective supervision pursuant to section 16-1619, Idaho Code, the department may petition the court for termination of the parent and child relationship in accordance with chapter 20, title 16, Idaho Code. Unless there are compelling reasons it would not be in the best interest of the child, the department shall be required to file a petition to terminate parental rights within sixty (60) days of a judicial determination that an infant has been abandoned or that reasonable efforts are not required because the parent has subjected the child to aggravated circumstances as determined by the court pursuant to section 16-1619(6)(d), Idaho Code. The department shall join as a party to the petition if such a petition to terminate is filed by another party; as well as to concurrently identify, recruit, process and approve a qualified family for adoption unless it is determined that such actions would not be in the best interest of the child, or the child is placed with a relative. If termination of parental rights is granted and the child is placed in the guardianship or legal custody of the department of health and welfare the court, upon petition, shall conduct a hearing as to the future status of the child within twelve (12) months of the order of termination of parental rights, and every twelve (12) months subsequently until the child is adopted or is in a placement sanctioned by the court. A petition to terminate parental rights shall be filed in the child protective act case. [I.C., § 16-1615, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 15, p. 491; am. 1989, ch. 218, § 3, p. 527; am. 1998, ch. 257, § 4, p. 850; am. 2000, ch. 233, § 1, p. 653; am. 2001, ch. 107, § 16, p. 350; am. 2003, ch. 279, § 7, p. 748; am. and redesign. 2005, ch. 391, § 26, p. 1263.]

#### STATUTORY NOTES

**Cross References.** — Child protective act, § 16-1601 et seq.

**Prior Laws.** — Another former § 16-1624 which comprised S.L. 1973, ch. 210, § 2 was repealed by S.L. 1976, ch. 204, § 1, p. 732.

A prior § 16-1624 which comprised S.L. 1963, ch. 321, § 1, p. 909 was repealed by S.L. 1973, ch. 210, § 1, p. 462.

**Compiler's Notes.** — This section was formerly compiled as § 16-1615.

Former § 16-1624 was amended and redesignated as § 16-1630 by S.L. 2005, ch. 391, § 32.

## JUDICIAL DECISIONS

### ANALYSIS

Denial of reinstatement proper.  
Finding of neglect.  
Termination proper.

#### Denial of Reinstatement Proper.

Mother's motion to reinstate parental rights due to newly discovered evidence was properly denied because (1) three months after the mother's parental rights were terminated, the mother discovered that a foster family's foster license had been temporarily revoked due to physical abuse on another foster child; (2) the mother had not made a showing that the physical abuse on another child in the foster family was relevant to the issue of her own character and fitness as a parent; (3) a magistrate court reached its decision through an exercise of reason by comparing all the evidence and weighing how it related to the child's best interest; and (4) the magistrate court addressed the issue of physical abuse and found that, at the age of 17, it would not have been in the child's best interest to reinstate the mother's parental rights. *Doe v. State (In re Doe)*, 145 Idaho 650, 182 P.3d 707 (2008).

glected her children was supported by substantial and competent evidence where the mother had been completely noncompliant with her case plan until her release from incarceration, and, upon release, the mother merely complied with the terms of her probation rather than the terms of her case plan, and there were several enumerated specific instances of neglect. *State v. Doe (In re Doe)*, 145 Idaho 662, 182 P.3d 1196 (2008).

#### Termination Proper.

The facts indicated that, when under the mother's care, children were in an unstable, unnurturing and dangerous environment; therefore, the trial court found sufficient evidence to support termination of the mother's parental rights based on the conclusion that she had neglected the children and that the children's best interests would be served by termination. *Doe v. State, Dep't of Health & Welfare*, 122 Idaho 644, 837 P.2d 319 (Ct. App. 1992).

#### Finding of Neglect.

Magistrate's finding that a mother ne-

**16-1625. Appeal — Effect on custody.** — (1) An aggrieved party may appeal the following orders or decrees of the court to the district court within thirty (30) days of the filing of such order or decree:

- (a) An adjudicatory decree entered pursuant to section 16-1619, Idaho Code;
- (b) Any order subsequent to the adjudicatory decree that vests legal custody of the child in the department or other authorized agency;
- (c) Any order subsequent to the adjudicatory decree that authorizes or mandates the department to cease reasonable efforts to make it possible to return the child to his home, including an order finding that the parent subjected the child to aggravated circumstances as set forth in section 16-1619(6)(d), Idaho Code; or
- (d) An order of dismissal.

(2) Where the order affects the custody of a child, the appeal shall be heard at the earliest practicable time. The pendency of an appeal shall not suspend the order of the court regarding a child, and it shall not discharge the child from the legal custody of the authorized agency to whose care he has been committed, unless otherwise ordered by the district court. No bond or undertaking shall be required of any party appealing to the district court

under the provisions of this section. Any final order or judgment of the district court shall be appealable to the supreme court of the state of Idaho in the same manner as appeals in other civil actions. The filing of the notice of appeal shall not, unless otherwise ordered, stay the order of the district court. [I.C., § 16-1617, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 16, p. 491; am. 2001, ch. 107, § 17, p. 350; am. and redsig. 2005, ch. 391, § 27, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Other former §§ 16-1625 — 16-1629 which comprised S.L. 1963, ch. 321, §§ 2-6, p. 909; 1972, ch. 196, § 2, p. 483; 1973, ch. 210, § 3, p. 462 were repealed by S.L. 1976, ch. 204, § 1.

**Compiler's Notes.** — This section was formerly compiled as § 16-1617.

Former § 16-1625 was amended and redesignated as § 16-1631 by S.L. 2005, ch. 391, § 33.

**16-1626. Court records.** — The court shall keep a record of all court proceedings under this chapter. The records shall be available only to parties to the proceeding, persons having full or partial custody of the subject child and authorized agencies providing protective supervision or having legal custody of the child. Any other person may have access to the records only upon permission by the court and then only if it is shown that such access is in the best interests of the child; or for the purpose of legitimate research. If the records are released for research purposes, the person receiving them must agree not to disclose any information which could lead to the identification of the child. [I.C., § 16-1621, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 20, p. 491; am. 1996, ch. 272, § 13, p. 884; am. and redsig. 2005, ch. 391, § 28, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1626 was repealed. See Prior Laws, § 16-1625.

**Compiler's Notes.** — This section was formerly compiled as § 16-1621.

Former § 16-1626 was amended and redesignated as § 16-1640 by S.L. 2005, ch. 391, § 42.

**16-1627. Authorization of emergency medical treatment.** — (1) At any time whether or not a child is under the authority of the court, the court may authorize medical or surgical care for a child when:

(a) A parent, legal guardian or custodian is not immediately available and cannot be found after reasonable effort in the circumstances of the case; or

(b) A physician informs the court orally or in writing that in his professional opinion, the life of the child would be greatly endangered without certain treatment and the parent, guardian or other custodian refuses or fails to consent.

(2) If time allows in a situation under subsection (1)(b) of this section, the court shall cause every effort to be made to grant each of the parents or legal guardian or custodian an immediate informal hearing, but this hearing shall not be allowed to further jeopardize the child's life.



- (3) In making its order under subsection (1) of this section, the court shall take into consideration any treatment being given the child by prayer through spiritual means alone, if the child or his parent, guardian or legal custodian are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment.
- (4) After entering any authorization under subsection (1) of this section, the court shall reduce the circumstances, finding and authorization to writing and enter it in the records of the court and shall cause a copy of the authorization to be given to the physician or hospital, or both, that was involved.
- (5) Oral authorization by the court is sufficient for care or treatment to be given by and shall be accepted by any physician or hospital. No physician or hospital nor any nurse, technician or other person under the direction of such physician or hospital shall be subject to criminal or civil liability for performance of care or treatment in reliance on the court's authorization, and any function performed thereunder shall be regarded as if it were performed with the child's and the parent's authorization. [I.C., § 16-1616, as added by 1976, ch. 204, § 2, p. 732; am. 1996, ch. 272, § 12, p. 884; am. and redesisg. 2005, ch. 391, § 29, p. 1263.]

STATUTORY NOTES

**Prior Laws.** — Another former § 16-1627 was repealed. See Prior Laws, § 16-1625.

**Compiler's Notes.** — This section was formerly compiled as § 16-1616.

Former § 16-1627 was amended and redesignated as § 16-1641 by S.L. 2005, ch. 391, § 43.

OPINIONS OF ATTORNEY GENERAL

The religious exemption provision, which allows parents to treat their children through "spiritual means," does not limit administrative or judicial authority to provide medical service to children. OAG 93-9.

- 16-1628. Support of committed child.** — (1) Whenever legal custody of a child is vested in someone other than his parents, after due notice to the parent, guardian or other persons legally obligated to care for and support the child, and after a hearing, the court may order and decree that the parent or other legally obligated person shall pay in such a manner as the court may direct a reasonable sum that will cover in whole or in part the support and treatment of the child after an order of temporary custody, if any, or the decree is entered. If the parent or other legally obligated person willfully fails or refuses to pay such sum, the court may proceed against him for contempt, or the order may be filed and shall have the effect of a civil judgment.
- (2) All child support orders shall notify the obligor that the order will be enforced by income withholding pursuant to chapter 12, title 32, Idaho Code.
- (3) Failure to include these provisions does not affect the validity of the support order or decree. The court shall require that the social security numbers of both the obligor and obligee be included in the order or decree. [I.C., § 16-1622, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186,

§ 21, p. 491; am. 1986, ch. 222, § 8, p. 593; am. 1990, ch. 361, § 4, p. 973; am. 1998, ch. 292, § 3, p. 928; am. and redesisg. 2005, ch. 391, § 30, p. 1263.]

### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1628 was repealed. See Prior Laws, § 16-1625.

**Compiler's Notes.** — This section was formerly compiled as § 16-1622.

Former § 16-1628 was amended and redesignated as § 16-1642 by S.L. 2005, ch. 391, § 44.

### RESEARCH REFERENCES

**A.L.R.** — Liability of parent for support of child institutionalized by juvenile court. 59 A.L.R.3d 636.

**16-1629. Powers and duties of the department.** — The department, working in conjunction with the court and other public and private agencies and persons, shall have the primary responsibility to implement the purpose of this chapter. To this end, the department is empowered and shall have the duty to do all things reasonably necessary to carry out the purpose of this chapter, including, but not limited to, the following:

(1) The department shall administer treatment programs for the protection and care of neglected, abused and abandoned children, and in so doing may place in foster care, shelter care, or other diagnostic, treatment, or care centers or facilities, children of whom it has been given custody. The department is to be governed by the standards found in chapter 12, title 39, Idaho Code.

(2) On December 1, the department shall make an annual statistical report to the governor covering the preceding fiscal year showing the number and status of persons in its custody and including such other data as will provide sufficient facts for sound planning in the conservation of children and youth. All officials and employees of the state and of every county and city shall furnish the department upon request, such information within their knowledge and control as the department deems necessary. Local agencies shall report in such uniform format as may be required by the department.

(3) The department shall be required to maintain a central registry for the reporting of child neglect, abuse and abandonment information. Provided however, that the department shall not retain any information for this purpose relating to a child, or parent of a child, abandoned pursuant to chapter 82, title 39, Idaho Code.

(4) The department shall make periodic evaluation of all persons in its custody or under its supervision for the purpose of determining whether existing orders and dispositions in individual cases shall be modified or continued in force. Evaluations may be made as frequently as the department considers desirable and shall be made with respect to every person at intervals not exceeding six (6) months. Reports of evaluation made pursuant to this section shall be filed with the court which vested custody of the person with the department. Reports of evaluation shall be provided to persons having full or partial legal or physical custody of a child. Failure of

the department to evaluate a person or to reevaluate him within six (6) months of a previous examination shall not of itself entitle the person to a change in disposition but shall entitle him, his parent, guardian or custodian or his counsel to petition the court pursuant to section 16-1622, Idaho Code.

(5) In a consultive capacity, the department shall assist communities in the development of constructive programs for the protection, prevention [treatment] and care of children and youth.

(6) The department shall keep written records of investigations, evaluations, prognoses and all orders concerning disposition or treatment of every person over whom it has legal custody. Department records shall be subject to disclosure according to chapter 3, title 9, Idaho Code, unless otherwise ordered by the court, the person consents to the disclosure, or disclosure is necessary for the delivery of services to the person. Notwithstanding the provisions restricting disclosure or the exemptions from disclosure provided in chapter 3, title 9, Idaho Code, all records pertaining to investigations, the rehabilitation of youth, the protection of children, evaluation, treatment and/or disposition records pertaining to the statutory responsibilities of the department shall be disclosed to any duly elected state official carrying out his official functions.

(7) The department shall establish appropriate administrative procedures for the processing of complaints of child neglect, abuse and abandonment received and for the implementation of the protection, treatment and care of children formally or informally placed in the custody of the department under this chapter including, but not limited to:

(a) Department employees whose job duties are related to the child protective services system under this chapter shall first be trained as to their obligations under this chapter regarding the protection of children whose health and safety may be endangered. The curriculum shall include information regarding their legal duties, how to conduct their work in conformity with the requirements of this chapter, information regarding applicable federal and state laws with regard to the rights of the child, parent and others who may be under investigation under the child protective services system, and the applicable legal and constitutional parameters within which they are to conduct their work.

(b) Department employees whose job duties are related to the child protective services system shall advise the individual of the complaints or allegations made against the individual at the time of the initial contact, consistent with protecting the identity of the referrant.

(8) The department having been granted legal custody of a child, subject to the judicial review provisions of this subsection, shall have the right to determine where and with whom the child shall live, provided that the child shall not be placed outside the state without the court's consent. Provided however, that the court shall retain jurisdiction over the child, which jurisdiction shall be entered on any order or petition granting legal custody to the department, and the court shall have jurisdiction over all matters relating to the child. The department shall not place the child in the home from which the court ordered the child removed without first obtaining the approval of the court.



(9) The department shall give to the court any information concerning the child that the court may at any time require, but in any event shall report the progress of the child under its custody at intervals of not to exceed six (6) months. The department shall file with the court at least five (5) days prior to the permanency hearing either under section 16-1622, Idaho Code, or, in the case of a finding of aggravated circumstances, section 16-1620, Idaho Code, the permanency plan and recommendations of the department. There shall be a rebuttable presumption that if a child is placed in the custody of the department and was also placed in out of the home care for a period not less than fifteen (15) out of the last twenty-two (22) months from the date the child entered shelter care, the department shall initiate a petition for termination of parental rights. This presumption may be rebutted by a finding of the court that the filing of a petition for termination of parental rights would not be in the best interests of the child or reasonable efforts have not been provided to reunite the child with his family, or the child is placed permanently with a relative.

(10) The department shall establish appropriate administrative procedures for the conduct of administrative reviews and hearings as required by federal statute for all children committed to the department and placed in out of the home care.

(11) At any time the department is considering a placement pursuant to this act, the department shall make a reasonable effort to place the child in the least disruptive environment to the child and in so doing may consider, without limitation, placement of the child with related persons. [I.C., § 16-1623, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 22, p. 491; am. 1989, ch. 218, § 4, p. 527; am. 1990, ch. 213, § 10, p. 480; am. 1991, ch. 212, § 6, p. 500; am. 1996, ch. 272, § 14, p. 884; am. 1996, ch. 361, § 1, p. 1216; am. 1998, ch. 257, § 5, p. 850; am. 1999, ch. 30, § 8, p. 41; am. 2000, ch. 233, § 2, p. 653; am. 2001, ch. 93, § 1, p. 232; am. 2001, ch. 107, § 19, p. 350; am. 2001, ch. 358, § 1, p. 1261; am. and redesign. 2005, ch. 25, § 78, p. 82; am. 2005, ch. 332, § 1, p. 1041; am. and redesign. 2005, ch. 391, § 31, p. 1263; am. 2006, ch. 16, § 2, p. 42; am. 2007, ch. 223, § 5, p. 669.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1629 was repealed. See Prior Laws, § 16-1625.

**Amendments.** — This section was amended by two 1996 acts which appear to be compatible and have been compiled together.

The 1996 amendment, by ch. 272, in subsection (d), added the fourth sentence; in the last sentence of subsection (h), substituted "department" for "dpeartment"; and added subsection (k).

The 1996 amendment, by ch. 361, in subsection (f), added the last sentence; and in the last sentence of subsection (h), substituted "department" for "dpeartment".

This section was amended by three 2001 acts which appear to be compatible and have been compiled together.

The 2001 amendment, by ch. 93, in subsec-

tion (a) deleted "group homes" following "shelter care".

The 2001 amendment, by ch. 107, in subsection (f), substituted "prognoses" for "prognosis"; in subsection (i), inserted "The department shall file with the court at least five (5) days prior to the permanency hearing under section 16-1611, Idaho Code, the permanency plan and recommendations of the department." following "exceed six (6) months."; in subsection (j), inserted the word "the" preceding "home care."

The 2001 amendment, by ch. 358, in subsection (c), added the second sentence.

This section was amended by three 2005 acts which appear to be compatible and have been compiled together.

The 2005 amendment, by ch. 25, corrected a

citation in subsection (3).

The 2005 amendment, by ch. 332, added “including, but not limited to” at the end of the introductory paragraph and paragraphs (1)[(a)] and (2)[(b)] in subsection (7).

The 2005 amendment, by ch. 391., renumbered this section from § 16-1623 and made stylistic citation changes.

The 2006 amendment, by ch. 16, redesignated former subsections (7)(1) and (7)(2) as subsections (7)(a) and (7)(b).

The 2007 amendment, by ch. 223, in the second sentence in subsection (9), inserted “either” and “or, in the case of a finding of aggravated circumstances, section 16-1620, Idaho Code.”

**Compiler’s Notes.** — This section was formerly compiled as § 16-1623.

Former § 16-1629 was amended and redesignated as § 16-1643 by S.L. 2005, ch. 391, § 45.

The bracketed insertion in subsection (5) was made by the compiler for clarity.

The term “this act”, referred to in paragraph (11), was added by S.L. 1996, ch. 272,

which is codified as §§ 16-1601 to 16-1603, 16-1609, 16-1610 to 16-1612, 16-1615, 16-1616, 16-1621, 16-1622, 16-1626, 16-1627, 16-1629, 16-1631, 16-1633, 16-1634, and 18-2604. The term should probably read “this chapter”, being chapter 16, title 16, Idaho Code.

Section 111 of S.L. 1990, ch. 213, as amended by S.L. 1991, ch. 329, § 16, provided that the 1990 amendment to this section would not take effect until July 1, 1993. Section 6 of S.L. 1991, ch. 212, amended subdivision (h) of this section, by stating only that it was amending “16-1623, Idaho Code,” without any reference to the postponed amendment. Therefore, the amendment was compiled only in the version of § 16-1623 effective until July 1, 1993.

**Effective Dates.** — Section 111 of S.L. 1990, ch. 213 as amended by S.L. 1991, ch. 329, § 16 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

## JUDICIAL DECISIONS

### ANALYSIS

Best interest of child.  
Intervention.  
Placement decisions.  
Presumptions.  
Termination petition.

### Best Interest of Child.

Magistrate’s findings that termination of a mother’s parental rights was in the best interest of the children was supported by substantial and competent evidence because social workers testified about the sporadic visitations and contacts by the mother, the repeated drug use relapses, unemployment, and issues regarding domestic violence, and it had been more than sixteen months since the mother had been able to provide her children with a stable home. *State v. Doe* (In re Doe), 145 Idaho 662, 182 P.3d 1196 (2008).

### Intervention.

Since the child protection act gives the department of health and welfare the affirmative right to determine where the child will live so long as the state has legal custody, the magistrate court was correct in ruling that the maternal care-giving grandmother did not have a conditional statutory right to intervene based on subsection (11) of this section. *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000).

### Placement Decisions.

A CPA action is not intended to provide a forum for multiple claimants to litigate their

right to custody, because, once the department has legal custody of a child under the CPA, the department and not the court has the authority to determine where the child should live; even though the court retains jurisdiction over the child as long as state custody continues, the CPA provides the court only limited authority to review the department’s placement decisions. *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000).

### Presumptions.

Magistrate court’s decision terminating a father’s parental rights was reversed, where the magistrate court began its analysis with the presumption that termination of the father’s parental rights was in the child’s best interest. Application of the incorrect legal standard infected the trial and did not constitute harmless error. *Doe v. Doe*, 144 Idaho 534, 164 P.3d 814 (2007).

### Termination Petition.

Where a child was out of the mother’s care for 18 of the last 22 months, despite its reluctance, the department of health and welfare was obligated under the law to file a petition for termination of parental rights, but, the magistrate court’s order terminating

the mother's parental rights was clearly erroneous. The magistrate erred in focusing on the mother's conviction and past criminal behavior while dismissing relevant and com-

petent evidence such as the social worker's testimony and that reunification was possible and was occurring. *State v. Roe* (In re Doe), 142 Idaho 594, 130 P.3d 1132 (2006).

**16-1630. Other duties of the department — Exceptions. —**

(1) Nothing in this chapter shall be construed as modifying duties of the department as described in sections 56-204A and 56-204B, Idaho Code.

(2) Nothing in this chapter shall be construed as assigning or imposing duties or responsibilities on the department by those provisions of this chapter relating to guardian ad litem. [I.C., § 16-1624, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 23, p. 491; am. 1989, ch. 281, § 3, p. 684; am. and redesisg. 2005, ch. 391, § 32, p. 1263.]

**STATUTORY NOTES**

**Prior Laws.** — Other former §§ 16-1630 — 16-1637, which comprised S.L. 1963, ch. 321, §§ 7-14; 1969, ch. 31, § 1; 1974, ch. 251, § 1 were repealed by S.L. 1976, ch. 204, § 1.

**Compiler's Notes.** — This section was

formerly compiled as § 16-1624.

Former § 16-1630 was amended and redesignated as § 16-1632 by S.L. 2005, ch. 391, § 34.

**16-1631. Authorization for department to act. —** (1) Upon receiving information that a child may be abused, neglected or abandoned, the department shall cause such investigation to be made in accordance with this chapter as is appropriate. In making the investigation the department shall use its own resources, and may enlist the cooperation of peace officers for phases of the investigation for which they are better equipped. Upon satisfying itself as to the course of action which should be pursued to best accord with the purpose of this chapter, the department shall:

- (a) Resolve the matter in such informal fashion as is appropriate under the circumstances; or
- (b) Seek to enter a voluntary agreement with all concerned persons to resolve the problem in such a manner that the child will remain in his own home; or
- (c) Refer the matter to the prosecutor or attorney general with recommendation that appropriate action be taken under this chapter; or
- (d) Refer the matter to the prosecutor or attorney general with recommendation that appropriate action be taken under other laws.

(2) In the event that the department concludes that a voluntary agreement pursuant to subsection (1)(b) of this section should be used, the agreement shall be in writing, shall state the behavioral basis of each parent and necessary third person, shall contain such other terms as the department and each parent having joint custody shall deem appropriate under the circumstances, shall utilize such resources as are available to the department from any source and are considered appropriate to the situation, shall specify the services or treatment to be undertaken, shall be signed by all persons, including:

- (a) The child if appropriate;
- (b) Every parent having joint custody of the subject child;
- (c) Any other full or part-time resident of the home;



(d) All other persons the department considers necessary to the agreement's success;  
and shall specify the responsibilities of each party to the agreement, which responsibilities shall be thoroughly explained to each person orally. The agreement shall not run for more than one (1) year. Copies shall be given to all signatories. [I.C., § 16-1625, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 24, p. 491; am. 1996, ch. 272, § 15, p. 884; am. and redesisg. 2005, ch. 391, § 33, p. 1263.]

STATUTORY NOTES

**Prior Laws.** — Another former § 16-1631 was repealed. See Prior Laws, § 16-1630.

**Compiler's Notes.** — This section was formerly compiled as § 16-1625.

Former § 16-1631 was amended and redesignated as § 16-1633 by S.L. 2005, ch. 391, § 35.

OPINIONS OF ATTORNEY GENERAL

School personnel incur no liability for allowing use of school facilities for purposes of child abuse investigation, so long as the reporting was done in good faith and without malice. OAG 93-2.

The authority of the Idaho department of

health and welfare to investigate reports of child abuse, abandonment and neglect includes the ability to determine who may be present and/or participate in the interview process. OAG 93-2.

**16-1632. Guardian ad litem coordinator — Duties — Annual report.** — (1) Under rules, policies and procedures adopted by the Idaho supreme court which may include, but are not limited to, provisions establishing fiscal controls and requiring compliance with all or part of the standards adopted by the national court appointed special advocate association, the persons or entities receiving moneys from the grant administrator to coordinate a guardian ad litem program in a judicial district may be required by the terms of the grant to perform any or all of the following duties:

(a) To establish, maintain and coordinate a districtwide guardian ad litem program consistent with the provisions of this chapter;

(b) To furnish the necessary administrative and staffing services as may from time to time be required;

(c) To act as a coordinator for the purpose of providing guardians ad litem for children brought within the purview of this chapter;

(d) To seek to have each child brought within the purview of this chapter available to him a guardian ad litem throughout each stage of any child protective proceeding;

(e) To establish a program for attorneys to represent guardians ad litem, whether or not appointed by the court in conjunction with the local, districtwide, and state bar associations;

(f) To the extent possible to establish a districtwide program to recruit volunteer guardians ad litem sufficient to provide services in each county of the judicial district;

(g) In conjunction with the department, prosecuting attorneys and city and county law enforcement officials, mental health professionals, social

workers, school counselors and the medical community, the coordinators may assist in the development and implementation of a statewide uniform protocol for the investigation of allegations of abuse, neglect or abandonment pursuant to the provisions of this chapter;

(h) To develop uniform criteria to screen, select, train and remove guardians ad litem;

(i) To establish a priority list of those proceedings under this chapter in which a guardian ad litem shall be appointed in districts where there are insufficient numbers of guardians ad litem.

(2) Each guardian ad litem coordinator shall submit an annual report for the preceding fiscal year to the grant administrator for delivery to the legislature no later than ten (10) days following the start of each regular session. Such report shall contain the number and type of proceedings filed in the district under this chapter, the number of children subject to proceedings in the district under this chapter and the number of appointed guardians ad litem, the nature of services the guardians ad litem provided, the number of guardians ad litem trained in each district, the number of hours of service provided by guardians ad litem and attorneys and a complete financial statement for the past year and financial support requirements for the next fiscal year.

(3) The coordinators and staff members of any guardian ad litem program receiving moneys from the grant administrator, and any persons volunteering to serve as guardians ad litem in such programs, shall submit to a fingerprint-based criminal history check through any law enforcement office in the state providing such service. The criminal history check shall include a statewide criminal identification bureau check, federal bureau of investigation criminal history check, and statewide sex offender registry check. A record of all background checks shall be maintained in the office of the supreme court of the state of Idaho with a copy going to the applicant. [I.C., § 16-1630, as added by 1989, ch. 281, § 4, p. 684; am. and redsig. 2005, ch. 391, § 34, p. 1263; am. 2007, ch. 26, § 2, p. 48.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1632 was repealed. See Prior Laws, § 16-1630.

**Amendments.** — The 2007 amendment, by ch. 26, in the section catchline and in the first sentence of subsection (2), substituted “guardian ad litem coordinator” for “child advocate coordinator”; added the language at the beginning of the introductory paragraph in subsection (1) preceding “the persons or entities”; deleted “central clearinghouse and” preceding “coordinator” in subsection (1)(c); and added subsection (3).

**Compiler’s Notes.** — This section was formerly compiled as § 16-1630.

Former § 16-1632 was amended and redesi-

gnated as § 16-1634 by S.L. 2005, ch. 391, § 36.

As to the national court appointed special advocate association, referred to in (1), see <http://www.nationalcasa.org>.

Section 12 of S.L. 1989, ch. 281 read: “Sections 4 through 11 of this act [§§ 16-1630 — 16-1637] shall remain in full force and effect only until July 1 1991, and as of that date are repealed, unless a later enacted statute, which is enacted before July 1, 1991, deletes or extends that date.” However, such section was repealed by § 1 of S.L. 1991, ch. 8, effective February 20, 1991, and, therefore, such sections are not repealed.

**16-1633. Guardian ad litem — Duties.** — Subject to the direction of the court, the guardian ad litem shall have the following duties which shall

continue until resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever first occurs:

(1) To conduct an independent factual investigation of the circumstances of the child including, without limitation, the circumstances described in the petition.

(2) To file with the court a written report stating the results of the investigation, the guardian ad litem's recommendations and such other information as the court may require. The guardian ad litem's written report shall be delivered to the court, with copies to all parties to the case at least five (5) days before the date set for the adjudicatory hearing. The report shall not be admitted into evidence at the adjudicatory hearing, and shall be used by the court only for disposition if the child is found to be within the purview of the act.

(3) To act as an advocate for the child for whom appointed at each stage of proceedings under this chapter and is charged with the general representation of the child. To that end, the guardian ad litem shall participate fully in the proceedings and to the degree necessary to adequately represent the child, and shall be entitled to confer with the child, and the child's siblings and parents.

(4) To facilitate and negotiate to ensure that the court, the department, if applicable, and the child's attorney, if any, fulfill their obligations to the child in a timely fashion.

(5) To monitor the circumstances of a child, if the child is found to be within the purview of the act, to assure compliance with law and to assure that the terms of the court's orders are being fulfilled and remain in the best interest of the child.

(6) To meet with any parent having joint legal or physical custody of the child, record the concerns of the parent, and report them to the court or file an affidavit stating why no meeting occurred.

(7) To maintain all information regarding the case confidential and to not disclose the same except to the court or to other parties to the case.

(8) Such other and further duties as may be expressly imposed by the court order. [I.C., § 16-1631, as added by 1989, ch. 281, § 5, p. 684; am. 1996, ch. 272, § 16, p. 884; am. and redesign. 2005, ch. 391, § 35, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1633 was repealed. See Prior Laws, § 16-1630.

**Compiler's Notes.** — This section was formerly compiled as § 16-1631.

Former § 16-1633 was amended and redesignated as § 16-1635 by S.L. 2005, ch. 391, § 37.

Section 12 of S.L. 1989, ch. 281 read: "Sections 4 through 11 of this act [§§ 16-1630 —

16-1637] shall remain in full force and effect only until July 1, 1991, and as of that date are repealed, unless a later enacted statute, which is enacted before July 1, 1991, deletes or extends that date." However, such section was repealed by § 1 of S.L. 1991, ch. 8, effective February 20, 1991, and, therefore, such sections are not repealed.



## JUDICIAL DECISIONS

## ANALYSIS

Evidence.

Level of participation.

**Evidence.**

In hearing regarding modification of temporary foster care, it was error for the magistrate to admit the guardian ad litem report into evidence in its entirety, as, in addition to the report being hearsay, many portions of the report related to statements made by third persons either to the guardian ad litem or to others. *Wood v. State*, Dep't of Health & Welfare, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995).

**Level of Participation.**

No error was committed by the magistrate in hearing regarding modification of temporary foster care in either refusing to limit the participation of the guardian ad litem or in failing to make a threshold determination as to what level of participation was necessary to represent the children in foster care proceedings. *Wood v. State*, Dep't of Health & Welfare, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995).

**16-1634. Guardian ad litem — Rights and powers.** — The guardian ad litem will have the following rights and powers, which shall continue until resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever first occurs:

(1) The guardian ad litem, if represented by counsel, may file pleadings, motions, memoranda and briefs on behalf of the child, and shall have all of the rights of a party whether conferred by statute, rule of court or otherwise.

(2) All parties to any proceeding under this chapter shall promptly notify the guardian ad litem and the guardian's attorney of all hearings, staffings, investigations, depositions and significant changes of circumstances of the child.

(3) Except to the extent prohibited or regulated by federal law or by the provisions of chapter 82, title 39, Idaho Code, upon presentation of a copy of the order appointing guardian ad litem, any person or agency, including, without limitation, any hospital, school, organization, department of health and welfare, doctor, nurse, or other health care provider, psychologist, psychiatrist, police department or mental health clinic shall permit the guardian ad litem to inspect and copy pertinent records necessary for the proceeding for which the guardian is appointed relating to the child and parent without consent of the child or parents. [I.C., § 16-1632, as added by 1989, ch. 281, § 6, p. 684; am. 1996, ch. 272, § 17, p. 884; am. 2001, ch. 357, § 5, p. 1252; am. and redesisg. 2005, ch. 25, § 79, p. 82; am. and redesisg. 2005, ch. 391, § 36, p. 1263.]

## STATUTORY NOTES

**Prior Laws.** — Another former § 16-1634 was repealed. See Prior Laws, § 16-1630.

**Amendments.** — This section was amended by two 2005 acts which appear to be compatible and are compiled together.

The 2005 amendment, by ch. 25, corrected a citation in subsection (3).

The 2005 amendment, by ch. 291, made the same correction as in ch. 25, renumbered this section from § 16-1632, and made stylistic changes.

**Compiler's Notes.** — This section was formerly compiled as § 16-1632.

Former § 16-1634 was amended and redesignated as § 16-1636 by S.L. 2005, ch. 391, § 38.

Section 12 of S.L. 1989, ch. 281 read: "Sections 4 through 11 of this act [§§ 16-1630 — 16-1637] shall remain in full force and effect only until July 1, 1991, and as of that date are repealed, unless a later enacted statute, which is enacted before July 1, 1991, deletes

or extends that date.” However, such section was repealed by § 1 of S.L. 1991, ch. 8, effective February 20, 1991, and, therefore, such sections are not repealed.

JUDICIAL DECISIONS

Representation of Children.

There is no statutory requirement that the magistrate make a threshold determination as to the level of participation necessary for a guardian ad litem to adequately represent the child or children. *Wood v. State*, Dep’t of Health & Welfare, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995).

**16-1635. Immunity from liability.** — Any person appointed as a guardian ad litem, the coordinator, or a guardian ad litem volunteer program employee shall be personally immune from any liability for acts, omissions or errors in the same manner as if such person were a volunteer officer or director under the provisions of section 6-1605, Idaho Code. [I.C., § 16-1633, as added by 1989, ch. 281, § 7, p. 684; am. and redesisg. 2005, ch. 391, § 37, p. 1263.]

STATUTORY NOTES

**Prior Laws.** — Another former § 16-1635 was repealed. See Prior Laws, § 16-1630.  
**Compiler’s Notes.** — This section was formerly compiled as § 16-1633.  
Former § 16-1635 was amended and redesignated as § 16-1637 by S.L. 2005, ch. 391, § 39.  
Section 12 of S.L. 1989, ch. 281 read: “Sections 4 through 11 of this act [§§ 16-1630 — 16-1637] shall remain in full force and effect only until July 1, 1991, and as of that date are repealed, unless a later enacted statute, which is enacted before July 1, 1991, deletes or extends that date.” However, such section was repealed by § 1 of S.L. 1991, ch. 8, effective February 20, 1991, and, therefore, such sections are not repealed.

**16-1636. Compliance with federal law.** — For the purposes of the child abuse prevention and treatment act, 42 U.S.C. sections 5101 et seq., grant[s] to this state under public law no. 93-247, or any related state or federal legislation, a guardian ad litem or other person appointed pursuant to section 16-1614, Idaho Code, shall be deemed a guardian ad litem to represent the interests of the minor in proceedings before the court. Any provisions of this chapter which shall cause this state to lose federal funding shall be considered null and void. [I.C., § 16-1634, as added by 1989, ch. 281, § 8, p. 684; am. and redesisg. 2005, ch. 391, § 38, p. 1263.]

STATUTORY NOTES

**Prior Laws.** — Another former § 16-1636 was repealed. See Prior Laws, § 16-1630.  
**Federal References.** — Public Law 93-247, referred to in this section, is codified as 42 USCS § 5101 et seq.  
**Compiler’s Notes.** — This section was formerly compiled as § 16-1634.  
Former § 16-1636 was amended and redesignated as § 16-1638 by S.L. 2005, ch. 391, § 40.  
The bracketed insertion was added by the compiler.  
Section 12 of S.L. 1989, ch. 281 read: “Sections 4 through 11 of this act [§§ 16-1630 — 16-1637] shall remain in full force and effect only until July 1, 1991, and as of that date are repealed, unless a later enacted statute, which is enacted before July 1, 1991, deletes or extends that date.” However, such section was repealed by § 1 of S.L. 1991, ch. 8, effective February 20, 1991, and, therefore, such sections are not repealed.

**16-1637. Exemption.** — Any person appointed as a guardian ad litem by court order shall be exempt from the provisions of chapter 32, title 54, Idaho Code. [I.C., § 16-1635, as added by 1989, ch. 281, § 9, p. 684; am. and redesisg. 2005, ch. 391, § 39, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Another former § 16-1637 was repealed. See Prior Laws, § 16-1630.

**Compiler's Notes.** — This section was formerly compiled as § 16-1635.

Former § 16-1637 was amended and redesignated as § 16-1639 by S.L. 2005, ch. 391, § 41.

Section 12 of S.L. 1989, ch. 281 read: "Sections 4 through 11 of this act [§§ 16-1630 —

16-1637] shall remain in full force and effect only until July 1, 1991, and as of that date are repealed, unless a later enacted statute, which is enacted before July 1, 1991, deletes or extends that date." However, such section was repealed by § 1 of S.L. 1991, ch. 8, effective February 20, 1991, and, therefore, such sections are not repealed.

**16-1638. Guardian ad litem account — Creation.** — (1) There is hereby created an account in the agency asset fund in the state treasury to be designated the guardian ad litem account.

(2) The account shall consist of:

- (a) Moneys appropriated to the account;
- (b) Donations, gifts and grants to the account from any source; and
- (c) Any other moneys which may hereafter be provided by law.

(3) Moneys in the account may be expended for the purposes provided in sections 16-1632 through 16-1638, Idaho Code. Interest earned on the investment of idle money in the guardian ad litem account shall be returned to the guardian ad litem account.

(4) Disbursements of moneys from the account shall be by appropriation from the legislature to the supreme court, which moneys shall be used for the payment of grants to qualified recipients and for expenses incurred for carrying out the provisions of this chapter. [I.C., § 16-1636, as added by 1989, ch. 281, § 10, p. 684; am. and redesisg. 2005, ch. 391, § 40, p. 1263; am. 2007, ch. 26, § 3, p. 48.]

#### STATUTORY NOTES

**Prior Laws.** — Former §§ 16-1638 — 16-1643, which comprised S.L. 1963, ch. 31, §§ 15-17, 20, 21; 1971, ch. 170, § 2; 1973, ch. 210, § 5; 1974, ch. 92, § 1, were repealed by S.L. 1976, ch. 204, § 1.

**Amendments.** — The 2007 amendment, by ch. 26, substituted "which moneys shall be used for the payment of grants" for "which shall in turn make payment of available moneys, upon request, to the grant administrator for the payment of grants" in subsection (4).

**Compiler's Notes.** — This section was

formerly compiled as § 16-1636.

Section 12 of S.L. 1989, ch. 281 read: "Sections 4 through 11 of this act [§§ 16-1630 — 16-1637] shall remain in full force and effect only until July 1, 1991, and as of that date are repealed, unless a later enacted statute, which is enacted before July 1, 1991, deletes or extends that date." However, such section was repealed by § 1 of S.L. 1991, ch. 8, effective February 20, 1991, and, therefore, such sections are not repealed.

**16-1639. Guardian ad litem grants.** — The grant administrator is hereby authorized and directed to award and administer grants from the money which shall be from time to time available to the grant administrator from the guardian ad litem account. The foregoing power and authorization



shall be subject to requirements imposed by the supreme court and the following provisions:

(1) Grants may be made available to any person, organization, corporation, or agency for any of the following purposes:

(a) To enable such entity to act as the guardian ad litem coordinator in any judicial district.

(b) To enable such entity to recruit, organize and administer a panel of guardians ad litem and volunteer lawyers to represent guardians ad litem.

(c) To enable such entity to recruit, organize, train and support persons or entities to act as guardian ad litem coordinators in judicial districts which do not yet have guardian ad litem coordinators.

(d) To enable such entity to pay the administrative and other miscellaneous expenses incurred in carrying out the provisions of the guardian ad litem program.

(2) The grant administrator shall endeavor in allocating available funds to foster the development and operation of a guardian ad litem program in each judicial district in the state; provided, however, the grant administrator shall have no obligation to seek out or organize guardian ad litem coordinators or persons willing to act as such in judicial districts lacking a guardian ad litem coordinator.

(3) Funds available to the grant administrator from the guardian ad litem account may be also used to pay the grant administrator's cost of performing its duties and obligations pursuant to this chapter. [I.C., § 16-1637, as added by 1989, ch. 281, § 11, p. 684; am. and redesisg. 2005, ch. 391, § 41, p. 1263; am. 2007, ch. 26, § 4, p. 48.]

#### STATUTORY NOTES

**Cross References.** — Guardian ad litem account, § 16-1638.

**Prior Laws.** — Former § 16-1639 was repealed. See Prior Laws, § 16-1638.

**Amendments.** — The 2007 amendment, by ch. 26, in the introductory paragraph, inserted "requirements imposed by the supreme court and"; and in subsection (1)(a) and twice in subsection (2), substituted "guardian ad litem" for "child advocate."

**Compiler's Notes.** — This section was

formerly compiled as § 16-1637.

Section 12 of S.L. 1989, ch. 281 read: "Sections 4 through 11 of this act [§§ 16-1630 — 16-1637] shall remain in full force and effect only until July 1, 1991, and as of that date are repealed, unless a later enacted statute, which is enacted before July 1, 1991, deletes or extends that date." However, such section was repealed by § 1 of S.L. 1991, ch. 8, effective February 20, 1991, and, therefore, such sections are not repealed.

**16-1640. Administrative Procedure Act.** — Nothing in this chapter shall be construed to alter the requirements provided in chapter 52, title 67, Idaho Code. [I.C., § 16-1626, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 25, p. 491; am. and redesisg. 2005, ch. 391, § 42, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 16-1640 was repealed. See Prior Laws, § 16-1638.

**Compiler's Notes.** — This section was formerly compiled as § 16-1626.

**16-1641. Construction.** — This chapter shall be liberally construed to accomplish the purposes herein set forth. [I.C., § 16-1627, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 26, p. 491; am. and redesign. 2005, ch. 391, § 43, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 16-1641 was repealed. See Prior Laws, § 16-1638.

**Compiler's Notes.** — This section was formerly compiled as § 16-1627.

#### OPINIONS OF ATTORNEY GENERAL

The authority of the Idaho department of health and welfare to investigate reports of child abuse, abandonment and neglect in-

cludes the ability to determine who may be present and/or participate in the interview process. OAG 93-2.

**16-1642. Short title.** — This chapter shall be known and cited as the "Child Protective Act." [I.C., § 16-1628, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 27, p. 491; am. and redesign. 2005, ch. 391, § 44, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 16-1642 was repealed. See Prior Laws, § 16-1638.

**Compiler's Notes.** — This section was formerly compiled as § 16-1628.

**16-1643. Severability.** — The provisions of this chapter are hereby declared to be severable and if any provision of this chapter or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this chapter. [I.C., § 16-1629, as added by 1976, ch. 204, § 2, p. 732; am. 1982, ch. 186, § 28, p. 491; am. and redesign. 2005, ch. 391, § 45, p. 1263.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 16-1643 was repealed. See Prior Laws, § 16-1638.

**Compiler's Notes.** — This section was formerly compiled as § 16-1629.

### CHAPTER 17

#### CORRECTION OF DELINQUENT CHILDREN

##### SECTION.

16-1701 — 16-1714. [Repealed.]

**16-1701 — 16-1714. Correction of delinquent children — Procedures.** [Repealed.]

#### STATUTORY NOTES

**Compiler's Notes.** — These sections, which comprised S.L. 1905, p. 106, §§ 1-8, 10, 12, 13; am. 1907, p. 231, §§ 1-3; reen. R.C.,

§§ 8328-8335, 8336a, 8336c, 8336d, 8337; am. 1909, p. 272, §§ 1-3; am. 1911, ch. 159, §§ 152-159, 161, 163-165; am. 1917, ch. 84, p.

299; reen. C.L. 38:266-38:273, 38:275, 38:277-38:279; C.S., §§ 1010-1014, 1014a, 1014b, 1015-1017, 1019, 1021-1023; am. 1923, ch. 16, § 1, p. 17; am. 1927, ch. 167, § 1, p. 221; am. 1927, ch. 169, § 1, p. 225; am. 1929, ch. 99, § 1, p. 163; I.C.A., §§ 31-1301 — 31-1314; am. 1953, ch. 260, §§ 1-13, p. 415, were repealed by S.L. 1955, ch. 259, § 42, p. 603.  
For present law, see § 20-501 et seq.

CHAPTER 18

YOUTH REHABILITATION ACT

SECTION.	SECTION.
16-1801 — 16-1820. [Amended and Redesignated.]	16-1836 — 16-1841. [Amended and Redesignated.]
16-1821, 16-1822. [Repealed.]	16-1842, 16-1843. [Repealed.]
16-1823. [Amended and Redesignated.]	16-1844. [Amended and Redesignated.]
16-1824, 16-1825. [Repealed.]	16-1845, 16-1846. [Repealed.]
16-1826 — 16-1829. [Amended and Redesignated.]	16-1847 — 16-1849. [Amended and Redesignated.]
16-1830 — 16-1835. [Repealed.]	16-1850. [Repealed.]

16-1801. [Amended and Redesignated.]

STATUTORY NOTES

**Prior Laws.** — Another former § 16-1801, which comprised S.L. 1955, ch. 259, § 2, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1801

was amended and redesignated as § 20-501 by § 2 of S.L. 1995, ch. 44, effective October 1, 1995.

16-1802. [Amended and Redesignated.]

STATUTORY NOTES

**Prior Laws.** — Another former § 16-1802, which comprised S.L. 1955, ch. 259, § 2, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1802

was amended and redesignated as § 20-502 by § 3 of S.L. 1995, ch. 44, effective October 1, 1995.

16-1803. [Amended and Redesignated.]

STATUTORY NOTES

**Prior Laws.** — Another former § 16-1803, which comprised S.L. 1955, ch. 259, § 3, p. 603; 1957, ch. 235, § 1, p. 560; 1959, ch. 119, § 1, p. 258, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1803

was amended and redesignated as § 20-505 by § 6 of S.L. 1995, ch. 44, effective October 1, 1995.

16-1804. [Amended and Redesignated.]

STATUTORY NOTES

**Prior Laws.** — Another former § 16-1804, which comprised S.L. 1955, ch. 259, § 4, p. 603; 1957, ch. 235, § 2, p. 560, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1804

was amended and redesignated as § 20-506 by § 7 of S.L. 1995, ch. 44, effective October 1, 1995.



**16-1805. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1805, which comprised S.L. 1955, ch. 259, § 5, p. 603, was repealed by S.L. 1963, ch. 319, § 47. was amended and redesignated as § 20-507 by § 8 of S.L. 1995, ch. 44, effective October 1, 1995.

**Compiler's Notes.** — Former § 16-1805

**16-1806. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1806, which comprised S.L. 1955, ch. 259, § 6, p. 603, was repealed by S.L. 1963, ch. 319, § 47. was amended and redesignated as § 20-508 by § 9 of S.L. 1995, ch. 44, effective October 1, 1995.

**Compiler's Notes.** — Former § 16-1806

**16-1806A. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1806A was amended and redesignated as § 20-509 by § 10 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1807. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1807, which comprised S.L. 1955, ch. 259, § 7, p. 603; 1957, ch. 235, § 3, p. 560, was repealed by S.L. 1963, ch. 319, § 47. **Compiler's Notes.** — Former § 16-1807 was amended and redesignated as § 20-510 by § 11 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1807A. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1807A was amended and redesignated as § 20-511 by § 12 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1808. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1808, which comprised S.L. 1955, ch. 259, § 8, p. 603; 1957, ch. 235, § 4, p. 560, was repealed by S.L. 1963, ch. 319, § 47. **Compiler's Notes.** — Former § 16-1808 was amended and redesignated as § 20-512 by § 13 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1809. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1809, which comprised S.L. 1955, ch. 259, § 9, p. 603, was repealed by S.L. 1963, ch. 319, § 47. **Compiler's Notes.** — Former § 16-1809

was amended and redesignated as § 20-513 by § 14 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1809A. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1809A was amended and redesignated as § 20-514 by § 15 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1810. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1810, which comprised S.L. 1955, ch. 259, § 10, p. 603, was repealed by S.L. 1963, ch. 319, § 47. was amended and redesignated as § 20-515 by § 16 of S.L. 1995, ch. 44, effective October 1, 1995.

**Compiler's Notes.** — Former § 16-1810

**16-1811. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1811, which comprised S.L. 1955, ch. 259, § 11, p. 603; 1957, ch. 235, § 5, p. 560, was repealed by S.L. 1963, ch. 319, § 47. **Compiler's Notes.** — Former § 16-1811 was amended and redesignated as § 20-516 by § 17 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1812. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1812, which comprised S.L. 1955, ch. 259, § 12, p. 603; 1957, ch. 235, § 6, p. 560, was repealed by S.L. 1963, ch. 319, § 47. **Compiler's Notes.** — Former § 16-1812 was amended and redesignated as § 20-517 by § 18 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1812A. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1812A was amended and redesignated as § 20-518 by § 19 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1813. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1813, which comprised 1963, ch. 319, § 13, p. 876; am. 1974, ch. 251, § 2, p. 1646, was repealed by S.L. 1984, ch. 81, § 1. by S.L. 1963, ch. 319, § 47.

A third former § 16-1813, which comprised S.L. 1955, ch. 259, § 13, p. 603, was repealed **Compiler's Notes.** — Former § 16-1813 was amended and redesignated as § 20-519 by § 20 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1814. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1814, which comprised S.L. 1955, ch. 259, § 14, p. 603; 1959, ch. 110, § 1, p. 234, was repealed by S.L. 1963, ch. 319, § 47.

A third former § 16-1814, which comprised S.L. 1963, ch. 319, § 14, p. 876; 1977, ch. 156,

§ 3, p. 399, was repealed by S.L. 1984, ch. 81, § 1.

**Compiler's Notes.** — Former § 16-1814 was amended and redesignated as § 20-520 by § 21 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1814A. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1814A was amended and redesignated as § 20-521 by § 22 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1814B. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1814B was amended and redesignated as § 20-522 by § 23 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1814C. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1814C was amended and redesignated as § 20-523 by § 24 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1815. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1815, which comprised S.L. 1955, ch. 259, § 15, p. 603; 1957, ch. 235, § 7, p. 560, was repealed by S.L. 1963, ch. 319, § 47.

A third former § 16-1815, which comprised S.L. 1963, ch. 319, § 15, p. 876, was repealed

by S.L. 1984, ch. 81, § 1.

**Compiler's Notes.** — Former § 16-1815 was amended and redesignated as § 20-524 by § 24 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1816. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1816, which comprised S.L. 1955, ch. 259, § 16, p. 603; 1957, ch. 235, § 7, p. 560, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1816 was amended and redesignated as § 20-525 by § 26 of S.L. 1995, ch. 44, effective October 1, 1995.



**16-1816A. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1816A by § 9 of S.L. 1995, ch. 277, effective October 1, 1995.  
was amended and redesignated as § 20-525A

**16-1817. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1817, was amended and redesignated as § 20-526 which comprised S.L. 1955, ch. 259, § 17, p. by § 27 of S.L. 1995, ch. 44, effective October 1, 1995.  
603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1817

**16-1818. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1818, was amended and redesignated as § 20-527 which comprised S.L. 1955, ch. 259, § 18, p. by § 28 of S.L. 1995, ch. 44, effective October 1, 1995.  
603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1818

**16-1819. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1819, was amended and redesignated as § 20-528 which comprised S.L. 1955, ch. 259, § 19, p. by § 29 of S.L. 1995, ch. 44, effective October 1, 1995.  
603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1819

**16-1820. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1820, which comprised S.L. 1955, ch. 259, § 20, p. 603; 1957, ch. 235, § 8, p. 560, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1820 was amended and redesignated as § 20-529 by § 30 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1821. Youth rehabilitation duties of board. [Repealed.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1821, which comprised S.L. 1955, ch. 259, § 21, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

which comprised 1963, ch. 319, § 21, p. 876, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.

**Compiler's Notes.** — Former § 16-1821,

**16-1822. Examination of committed person. [Repealed.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1822, which comprised S.L. 1955, ch. 259, § 22, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1822,

which comprised 1963, ch. 319, § 22, p. 876, was repealed by S.L. 1995, ch. 44, § 31, effective October 1, 1995.

**16-1823. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1823, which comprised S.L. 1955, ch. 259, § 23, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1823

was amended and redesignated as § 20-530 by § 32 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1824. Written records. [Repealed.]****STATUTORY NOTES**

**Prior Laws.** — Another § 16-1824, which comprised S.L. 1955, ch. 259, § 24, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1824,

which comprised 1963, ch. 319, § 24, p. 876, was repealed by S.L. 1995, ch. 44, § 33, effective October 1, 1995.

**16-1825. Failure to reexamine — Effect of. [Repealed.]****STATUTORY NOTES**

**Prior Laws.** — Another § 16-1825, which comprised S.L. 1955, ch. 259, § 25, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1825,

which comprised 1963, ch. 319, § 25, p. 876, was repealed by S.L. 1995, ch. 44, § 33, effective October 1, 1995.

**16-1826. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1826, which comprised S.L. 1955, ch. 259, § 26, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1826

was amended and redesignated as § 20-504 by § 5 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1827. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1827, which comprised 1963, ch. 319, § 27, p. 876, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.

A third former § 16-1827, which comprised S.L. 1955, ch. 259, § 27, p. 603, was repealed

by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1827 was amended and redesignated as § 20-531 by § 34 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1828. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1828, which comprised S.L. 1955, ch. 259, § 28, p. 603, was repealed by S.L. 1963, ch. 319, § 47. was amended and redesignated as § 20-532 by § 35 of S.L. 1995, ch. 44, effective October 1, 1995.

**Compiler's Notes.** — Former § 16-1828

**16-1829. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1829, which comprised 1963, ch. 319, § 29, p. 876, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.

A third former § 16-1829, which comprised S.L. 1955, ch. 259, § 29, p. 603, was repealed

by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1829 was amended and redesignated as § 20-533 by § 36 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1830. Revocation of conditional release — Order of department to retake escapee or conditional release violator — Prerevocation hearing procedure. [Repealed.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1830, which comprised 1963, ch. 319, § 30, p. 876, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.

A third former § 16-1830, which comprised S.L. 1955, ch. 259, § 30, p. 603, was repealed

by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1830, which comprised I.C., § 16-1830, as added by 1989, ch. 155, § 9, p. 371, was repealed by S.L. 1995, ch. 44, § 37, effective October 1, 1995.

**16-1831. Conditional release document to specify conditions of conditional release — Signature by youth offender — After care services. [Repealed.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1831, which comprised 1963, ch. 319, § 31, p. 876, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.

A third former § 16-1831, which comprised S.L. 1955, ch. 259, § 31, p. 603, was repealed

by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1831, which comprised I.C., § 16-1831, as added by 1989, ch. 155, § 9, p. 371, was repealed by S.L. 1995, ch. 44, § 37, effective October 1, 1995.

**16-1832. Discharge. [Repealed.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1832, which comprised 1963, ch. 319, § 32, p. 876; am. 1986, ch. 84, § 4, p. 243, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.

A third former § 16-1832, which comprised S.L. 1955, ch. 259, § 32, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1832, which comprised I.C., § 16-1832, as added by



1989, ch. 155, § 9, p. 371; am. 1993, ch. 84, § 1, p. 214, was repealed by S.L. 1995, ch. 44, § 37, effective October 1, 1995.

**16-1833. Community based correction programs — Establishment — Standards — Placement of youth offenders. [Repealed.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1833, which comprised 1963, ch. 319, § 33, p. 876; am. 1984, ch. 81, § 14, p. 148, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.

A third former § 16-1833, which comprised S.L. 1955, ch. 259, § 33, p. 603; 1961, ch. 127,

§ 187, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1833, which comprised I.C., § 16-1833, as added by 1989, ch. 155, § 9, p. 371, was repealed by S.L. 1995, ch. 44, § 37, effective October 1, 1995.

**16-1834. Case management staff required — Duties. [Repealed.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1834, which comprised 1963, ch. 319, § 34, p. 876, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.

A third former § 16-1834, which comprised S.L. 1955, ch. 259, § 34, p. 603, was repealed

by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1834, which comprised I.C., § 16-1834, as added by 1989, ch. 155, § 9, p. 371, was repealed by S.L. 1995, ch. 44, § 37, effective October 1, 1995.

**16-1835. Diagnostic and observation programs. [Repealed.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1835, which comprised 1963, ch. 319, § 35, p. 876, was repealed by S.L. 1984, ch. 81, § 1.

A third former § 16-1835, which comprised S.L. 1955, ch. 259, § 35, p. 603, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1835, which comprised I.C., § 16-1835, as added by 1989, ch. 155, § 9, p. 371, was repealed by S.L. 1995, ch. 44, § 37, effective October 1, 1995.

**16-1836. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1836, which comprised 1963, ch. 319, § 36, p. 876, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.

A third former § 16-1836, which comprised S.L. 1955, ch. 259, § 36, p. 603, was repealed

by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1836 was amended and redesignated as § 20-534 by § 38 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1837. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1837, which comprised 1963, ch. 319, § 37, p. 876,

was repealed by S.L. 1984, ch. 81, § 1.

A third former § 16-1837, which comprised

S.L. 1955, ch. 259, § 37, p. 603, was repealed by S.L. 1963, ch. 319, § 47.  
was amended and redesignated as § 20-535 by § 39 of S.L. 1995, ch. 44, effective October 1, 1995.

**Compiler’s Notes.** — Former § 16-1837

**16-1838. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1838, which comprised 1963, ch. 319, § 38, p. 876, was repealed by S.L. 1984, ch. 81, § 1.  
by S.L. 1963, ch. 319, § 47.  
**Compiler’s Notes.** — Former § 16-1838 was amended and redesignated as § 20-536 by § 40 of S.L. 1995, ch. 44, effective October 1, 1995.

A third former § 16-1838, which comprised S.L. 1955, ch. 259, § 38, p. 603, was repealed

**16-1839. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1839, which comprised 1963, ch. 319, § 39, p. 876, was repealed by S.L. 1984, ch. 81, § 1.  
by S.L. 1963, ch. 319, § 47.  
**Compiler’s Notes.** — Former § 16-1839 was amended and redesignated as § 20-537 by § 41 of S.L. 1995, ch. 44, effective October 1, 1995.

A third former § 16-1839, which comprised S.L. 1955, ch. 259, § 39, p. 603, was repealed

**16-1840. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1840, which comprised 1963, ch. 319, § 40, p. 876; am. 1973, ch. 87, § 8, p. 137, was repealed by S.L. 1989, ch. 155, § 8, effective January 15, 1990.  
S.L. 1955, ch. 259, § 40, p. 603, was repealed by S.L. 1963, ch. 319, § 47.  
**Compiler’s Notes.** — Former § 16-1840 was amended and redesignated as § 20-538 by § 42 of S.L. 1995, ch. 44, effective October 1, 1995.

A third former § 16-1840, which comprised

**16-1841. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1841, which comprised 1963, ch. 319, § 41, p. 876, was repealed by S.L. 1989, ch. 155, § 8.  
by S.L. 1963, ch. 319, § 47.  
**Compiler’s Notes.** — Former § 16-1841 was amended and redesignated as § 20-539 by § 43 of S.L. 1995, ch. 44, effective October 1, 1995.

A third former § 16-1841, which comprised S.L. 1955, ch. 259, § 41, p. 603, was repealed

**16-1842. Order for payment of costs. [Repealed.]**

**STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1842, which comprised 1963, ch. 319, § 42, p. 876, was repealed by S.L. 1989, ch. 155, § 8.  
by S.L. 1963, ch. 319, § 47.  
**Compiler’s Notes.** — Former § 16-1842, which comprised I.C., § 16-1842, as added by 1989, ch. 155, § 9, p. 371, was repealed by S.L. 1992, ch. 194, § 2.

A third former § 16-1842, which comprised S.L. 1955, ch. 259, § 45, p. 603, was repealed

**16-1843. Effect of discharge by department. [Repealed.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1843, which comprised 1963, ch. 319, § 43, p. 876, was repealed by S.L. 1989, ch. 155, § 8.

A third former § 16-1843, which comprised S.L. 1961, ch. 87, § 1, p. 111, was repealed by S.L. 1963, ch. 319, § 47.

**Compiler's Notes.** — Former § 16-1843, which comprised I.C., § 16-1843, as added by 1989, ch. 155, § 9, p. 371, was repealed by S.L. 1995, ch. 44, § 44, effective October 1, 1995.

**16-1844. [Amended and Redesignated.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1844, which comprised 1963, ch. 319, § 45, p. 876, was repealed by S.L. 1989, ch. 155, § 8.

**Compiler's Notes.** — Former § 16-1844

was amended and redesignated as § 20-540 by § 45 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1845. Appeal not to stay commitment, exception. [Repealed.]****STATUTORY NOTES**

**Prior Laws.** — Another former § 16-1845, which comprised 1963, ch. 319, § 46, p. 876, was repealed by S.L. 1989, ch. 155, § 8.

**Compiler's Notes.** — Former § 16-1845,

which comprised I.C., § 16-1845, as added by 1989, ch. 155, § 9, p. 371, was repealed by S.L. 1995, ch. 44, § 46, effective October 1, 1995.

**16-1846. Penalty clause. [Repealed.]****STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 16-1846, as added by 1989, ch. 155, § 9, p. 371, was repealed by S.L.

1990, ch. 289, § 1, effective April 5, 1990, retroactive to January 15, 1990.

**16-1847. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1847 was amended and redesignated as § 20-541

by § 47 of S.L. 1995, ch. 44, effective October 1, 1995.

**16-1848. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 16-1848 was amended and redesignated as § 20-547

by § 54 of S.L. 1995, ch. 44, effective October 1, 1995.



16-1849. [Amended and Redesignated.]

STATUTORY NOTES

**Compiler’s Notes.** — Former § 16-1849 by § 48 of S.L. 1995, ch. 44, effective October was amended and redesignated as § 20-542 1, 1995.

16-1850. Citation of act. [Repealed.]

STATUTORY NOTES

**Compiler’s Notes.** — This section, which ch. 155, § 9, p. 371, was repealed by S.L. comprised I.C., § 16-1850, as added by 1989, 1995, ch. 44, § 49, effective October 1, 1995.

CHAPTER 19

INTERSTATE COMPACT FOR JUVENILES

SECTION.

16-1901. Compacts with other states authorized.

SECTION.

16-1902. Short title.

16-1903 — 16-1910. [Repealed.]

**16-1901. Compacts with other states authorized.** — The governor of this state is hereby authorized and directed to execute a compact on behalf of the state of Idaho with any of the United States legally joining therein in the form substantially as follows:

ARTICLE I

PURPOSE

The compacting states to this interstate compact recognize that each state is responsible for the proper supervision or return of juveniles, delinquents and status offenders who are on probation or parole and who have absconded, escaped or run away from supervision and control and in so doing have endangered their own safety and the safety of others. The compacting states also recognize that each state is responsible for the safe return of juveniles who have run away from home and in doing so have left their state of residence. The compacting states also recognize that congress, by enacting the crime control act, 4 U.S.C. section 112 (1965), has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime.

It is the purpose of this compact, through means of joint and cooperative action among the compacting states to: (A) ensure that the adjudicated juveniles and status offenders subject to this compact are provided adequate supervision and services in the receiving state as ordered by the adjudicating judge or parole authority in the sending state; (B) ensure that the public safety interests of the citizens, including the victims of juvenile offenders, in both the sending and receiving states are adequately protected; (C) return juveniles who have run away, absconded or escaped from supervision or control or have been accused of an offense to the state requesting their

return; (D) make contracts for the cooperative institutionalization in public facilities in member states for delinquent youth needing special services; (E) provide for the effective tracking and supervision of juveniles; (F) equitably allocate the costs, benefits and obligations of the compacting states; (G) establish procedures to manage the movement between states of juvenile offenders released to the community under the jurisdiction of courts, juvenile departments, or any other criminal or juvenile justice agency which has jurisdiction over juvenile offenders; (H) ensure immediate notice to jurisdictions where defined offenders are authorized to travel or to relocate across state lines; (I) establish procedures to resolve pending charges (detainers) against juvenile offenders prior to transfer or release to the community under the terms of this compact; (J) establish a system of uniform data collection on information pertaining to juveniles subject to this compact that allows access by authorized juvenile justice and criminal justice officials, and regular reporting of compact activities to heads of state executive, judicial, and legislative branches and juvenile and criminal justice administrators; (K) monitor compliance with rules governing interstate movement of juveniles and initiate interventions to address and correct noncompliance; (L) coordinate training and education regarding the regulation of interstate movement of juveniles for officials involved in such activity; and (M) coordinate the implementation and operation of the compact with the interstate compact for the placement of children, the interstate compact for adult offender supervision and other compacts affecting juveniles particularly in those cases where concurrent or overlapping supervision issues arise. It is the policy of the compacting states that the activities conducted by the interstate commission created herein are the formation of public policies and therefore are public business. Furthermore, the compacting states shall cooperate and observe their individual and collective duties and responsibilities for the prompt return and acceptance of juveniles subject to the provisions of this compact. The provisions of this compact shall be reasonably and liberally construed to accomplish the purposes and policies of the compact.

## ARTICLE II

### DEFINITIONS

As used in this compact, unless the context clearly requires a different construction:

A. "Bylaws" means: those bylaws established by the interstate commission for its governance, or for directing or controlling its actions or conduct.

B. "Compact administrator" means: the individual in each compacting state appointed pursuant to the terms of this compact, responsible for the administration and management of the state's supervision and transfer of juveniles subject to the terms of this compact, the rules adopted by the interstate commission and policies adopted by the state council under this compact.

C. "Compacting state" means: any state which has enacted the enabling legislation for this compact.

D. "Commissioner" means: the voting representative of each compacting state appointed pursuant to article III of this compact.

E. "Court" means: any court having jurisdiction over delinquent, neglected, or dependent children.

F. "Deputy compact administrator" means: the individual, if any, in each compacting state appointed to act on behalf of a compact administrator pursuant to the terms of this compact responsible for the administration and management of the state's supervision and transfer of juveniles subject to the terms of this compact, the rules adopted by the interstate commission and policies adopted by the state council under this compact.

G. "Interstate Commission" means: the interstate commission for juveniles created by article III of this compact.

H. "Juvenile" means: any person defined as a juvenile in any member state or by the rules of the interstate commission, including:

- (1) Accused delinquent — a person charged with an offense that, if committed by an adult, would be a criminal offense;
- (2) Adjudicated delinquent — a person found to have committed an offense that, if committed by an adult, would be a criminal offense;
- (3) Accused status offender — a person charged with an offense that would not be a criminal offense if committed by an adult;
- (4) Adjudicated status offender — a person found to have committed an offense that would not be a criminal offense if committed by an adult; and
- (5) Nonoffender — a person in need of supervision who has not been accused or adjudicated a status offender or delinquent.

I. "Noncompacting state" means: any state which has not enacted the enabling legislation for this compact.

J. "Probation or parole" means: any kind of supervision or conditional release of juveniles authorized under the laws of the compacting states.

K. "Rule" means: a written statement by the interstate commission promulgated pursuant to article VI of this compact that is of general applicability, implements, interprets or prescribes a policy or provision of the compact, or an organizational, procedural, or practice requirement of the commission, and has the force and effect of statutory law in a compacting state, and includes the amendment, repeal, or suspension of an existing rule.

L. "State" means: a state of the United States, the District of Columbia (or its designee), the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands.

### ARTICLE III

#### INTERSTATE COMMISSION FOR JUVENILES

A. The compacting states hereby create the "Interstate Commission for Juveniles." The commission shall be a body corporate and joint agency of the compacting states. The commission shall have all the responsibilities, powers and duties set forth herein, and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact.



B. The interstate commission shall consist of commissioners appointed by the appropriate appointing authority in each state pursuant to the rules and requirements of each compacting state and in consultation with the state council for interstate juvenile supervision created hereunder. The commissioner shall be the compact administrator, deputy compact administrator or designee from that state who shall serve on the interstate commission in such capacity under or pursuant to the applicable law of the compacting state.

C. In addition to the commissioners who are the voting representatives of each state, the interstate commission shall include individuals who are not commissioners, but who are members of interested organizations. Such noncommissioner members must include a member of the national organizations of governors, legislators, state chief justices, attorneys general, interstate compact for adult offender supervision, interstate compact for the placement of children, juvenile justice and juvenile corrections officials, and crime victims. All noncommissioner members of the interstate commission shall be *ex officio* (nonvoting) members. The interstate commission may provide in its bylaws for such additional *ex officio* (nonvoting) members, including members of other national organizations, in such numbers as shall be determined by the commission.

D. Each compacting state represented at any meeting of the commission is entitled to one (1) vote. A majority of the compacting states shall constitute a quorum for the transaction of business, unless a larger quorum is required by the bylaws of the interstate commission.

E. The commission shall meet at least once each calendar year. The chairperson may call additional meetings and, upon the request of a simple majority of the compacting states, shall call additional meetings. Public notice shall be given of all meetings and meetings shall be open to the public.

F. The interstate commission shall establish an executive committee, which shall include commission officers, members, and others as determined by the bylaws. The executive committee shall have the power to act on behalf of the interstate commission during periods when the interstate commission is not in session, with the exception of rulemaking and/or amendment to the compact. The executive committee shall oversee the day-to-day activities of the administration of the compact managed by an executive director and interstate commission staff; administer enforcement and compliance with the provisions of the compact, its bylaws and rules; and perform such other duties as directed by the interstate commission or set forth in the bylaws.

G. Each member of the interstate commission shall have the right and power to cast a vote to which that compacting state is entitled and to participate in the business and affairs of the interstate commission. A member shall vote in person and shall not delegate a vote to another compacting state. However, a commissioner, in consultation with the state council, shall appoint another authorized representative, in the absence of the commissioner from that state, to cast a vote on behalf of the compacting state at a specified meeting. The bylaws may provide for members' participation in meetings by telephone or other means of telecommunication or electronic communication.

H. The interstate commission's bylaws shall establish conditions and procedures under which the interstate commission shall make its information and official records available to the public for inspection or copying. The interstate commission may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests.

I. Public notice shall be given of all meetings and all meetings shall be open to the public, except as set forth in the rules or as otherwise provided in the compact. The interstate commission and any of its committees may close a meeting to the public where it determines by two-thirds (2/3) vote that an open meeting would be likely to:

1. Relate solely to the interstate commission's internal personnel practices and procedures;
2. Disclose matters specifically exempted from disclosure by statute;
3. Disclose trade secrets or commercial or financial information which is privileged or confidential;
4. Involve accusing any person of a crime, or formally censuring any person;
5. Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;
6. Disclose investigative records compiled for law enforcement purposes;
7. Disclose information contained in or related to examination, operating or condition reports prepared by, or on behalf of or for the use of, the interstate commission with respect to a regulated person or entity for the purpose of regulation or supervision of such person or entity;
8. Disclose information, the premature disclosure of which would significantly endanger the stability of a regulated person or entity; or
9. Specifically relate to the interstate commission's issuance of a subpoena, or its participation in a civil action or other legal proceeding.

J. For every meeting closed pursuant to this provision, the interstate commission's legal counsel shall publicly certify that, in the legal counsel's opinion, the meeting may be closed to the public, and shall reference each relevant exemptive provision. The interstate commission shall keep minutes which shall fully and clearly describe all matters discussed in any meeting and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll call vote (reflected in the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

K. The interstate commission shall collect standardized data concerning the interstate movement of juveniles as directed through its rules which shall specify the data to be collected, the means of collection and data exchange and reporting requirements. Such methods of data collection, exchange and reporting shall insofar as is reasonably possible conform to up-to-date technology and coordinate its information functions with the appropriate repository of records.

## ARTICLE IV

## POWERS AND DUTIES OF THE INTERSTATE COMMISSION

The commission shall have the following powers and duties:

1. To provide for dispute resolution among compacting states.
2. To promulgate rules to effect the purposes and obligations as enumerated in this compact, which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact.
3. To oversee, supervise and coordinate the interstate movement of juveniles subject to the terms of this compact and any bylaws adopted and rules promulgated by the interstate commission.
4. To enforce compliance with the compact provisions, the rules promulgated by the interstate commission, and the bylaws, using all necessary and proper means including, but not limited to, the use of judicial process.
5. To establish and maintain offices which shall be located within one (1) or more of the compacting states.
6. To purchase and maintain insurance and bonds.
7. To borrow, accept, hire or contract for services of personnel.
8. To establish and appoint committees and hire staff which it deems necessary for the carrying out of its functions including, but not limited to, an executive committee as required by article III of this compact which shall have the power to act on behalf of the interstate commission in carrying out its powers and duties hereunder.
9. To elect or appoint such officers, attorneys, employees, agents, or consultants, and to fix their compensation, define their duties and determine their qualifications; and to establish the interstate commission's personnel policies and programs relating to, inter alia, conflicts of interest, rates of compensation, and qualifications of personnel.
10. To accept any and all donations and grants of money, equipment, supplies, materials, and services, and to receive, utilize, and dispose of it.
11. To lease, purchase, accept contributions or donations of, or otherwise to own, hold, improve or use any property, real, personal, or mixed.
12. To sell, convey, mortgage, pledge, lease, exchange, abandon, or otherwise dispose of any property, real, personal or mixed.
13. To establish a budget and make expenditures and levy dues as provided in article VIII of this compact.
14. To sue and be sued.
15. To adopt a seal and bylaws governing the management and operation of the interstate commission.
16. To perform such functions as may be necessary or appropriate to achieve the purposes of this compact.
17. To report annually to the legislatures, governors, judiciary, and state councils of the compacting states concerning the activities of the interstate commission during the preceding year. Such reports shall also include any recommendations that may have been adopted by the interstate commission.



18. To coordinate education, training and public awareness regarding the interstate movement of juveniles for officials involved in such activity.

19. To establish uniform standards of the reporting, collecting and exchanging of data.

20. The interstate commission shall maintain its corporate books and records in accordance with the bylaws.

## ARTICLE V

### ORGANIZATION AND OPERATION OF THE INTERSTATE COMMISSION

#### Section A. Bylaws

1. The interstate commission shall, by a majority of the members present and voting, within twelve (12) months after the first interstate commission meeting, adopt bylaws to govern its conduct as may be necessary or appropriate to carry out the purposes of the compact, including, but not limited to:

- a. Establishing the fiscal year of the interstate commission;
- b. Establishing an executive committee and such other committees as may be necessary;
- c. Provide for the establishment of committees governing any general or specific delegation of any authority or function of the interstate commission;
- d. Providing reasonable procedures for calling and conducting meetings of the interstate commission, and ensuring reasonable notice of each such meeting;
- e. Establishing the titles and responsibilities of the officers of the interstate commission;\*
- f. Providing a mechanism for concluding the operations of the interstate commission and the return of any surplus funds that may exist upon the termination of the compact after the payment and/or reserving of all of its debts and obligations.
- g. Providing "start-up" rules for initial administration of the compact; and
- h. Establishing standards and procedures for compliance and technical assistance in carrying out the compact.

#### Section B. Officers and Staff

1. The interstate commission shall, by a majority of the members, elect annually from among its members a chairperson and a vice chairperson, each of whom shall have such authority and duties as may be specified in the bylaws. The chairperson or, in the chairperson's absence or disability, the vice chairperson shall preside at all meetings of the interstate commission. The officers so elected shall serve without compensation or remuneration from the interstate commission; provided that, subject to the availability of budgeted funds, the officers shall be reimbursed for any ordinary and necessary costs and expenses incurred by them in the performance of their duties and responsibilities as officers of the interstate commission.

2. The interstate commission shall, through its executive committee, appoint or retain an executive director for such period, upon such terms and conditions and for such compensation as the interstate commission may deem appropriate. The executive director shall serve as secretary to the interstate commission, but shall not be a member and shall hire and supervise such other staff as may be authorized by the interstate commission.

#### Section C. Qualified Immunity, Defense and Indemnification

1. The commission's executive director and employees shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of or relating to any actual or alleged act, error, or omission that occurred, or that such person had a reasonable basis for believing occurred within the scope of commission employment, duties, or responsibilities; provided, that any such person shall not be protected from suit or liability for any damage, loss, injury, or liability caused by the intentional or willful and wanton misconduct of any such person.

2. The liability of any commissioner, or the employee or agent of a commissioner, acting within the scope of such person's employment or duties for acts, errors, or omissions occurring within such person's state may not exceed the limits of liability set forth under the constitution and laws of that state for state officials, employees, and agents. Nothing in this subsection shall be construed to protect any such person from suit or liability for any damage, loss, injury, or liability caused by the intentional or willful and wanton misconduct of any such person.

3. The interstate commission shall defend the executive director or the employees or representatives of the interstate commission and, subject to the approval of the attorney general of the state represented by any commissioner of a compacting state, shall defend such commissioner or the commissioner's representatives or employees in any civil action seeking to impose liability arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of interstate commission employment, duties, or responsibilities, provided that the actual or alleged act, error, or omission did not result from intentional or willful and wanton misconduct on the part of such person.

4. The interstate commission shall indemnify and hold the commissioner of a compacting state, or the commissioner's representatives or employees, or the interstate commission's representatives or employees, harmless in the amount of any settlement or judgment obtained against such persons arising out of any actual or alleged act, error, or omission that occurred within the scope of interstate commission employment, duties, or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of interstate commission employment, duties, or responsibilities, provided that the actual or alleged act, error, or omission did not result from intentional or willful and wanton misconduct on the part of such persons.

## ARTICLE VI

## RULEMAKING FUNCTIONS OF THE INTERSTATE COMMISSION

A. The interstate commission shall promulgate and publish rules in order to effectively and efficiently achieve the purposes of the compact.

B. Rulemaking shall occur pursuant to the criteria set forth in this article and the bylaws and rules adopted pursuant thereto. Such rulemaking shall substantially conform to the principles of the “Model State Administrative Procedures Act,” 1981 Act, Uniform Laws Annotated, Vol. 15, p.1 (2000), or such other administrative procedures act, as the interstate commission deems appropriate consistent with due process requirements under the United States Constitution as now or hereafter interpreted by the United States supreme court. All rules and amendments shall become binding as of the date specified, as published with the final version of the rule as approved by the commission.

C. When promulgating a rule, the interstate commission shall, at a minimum:

1. Publish the proposed rule’s entire text stating the reason(s) for that proposed rule;
2. Allow and invite any and all persons to submit written data, facts, opinions and arguments, which information shall be added to the record, and be made publicly available;
3. Provide an opportunity for an informal hearing if petitioned by ten (10) or more persons; and
4. Promulgate a final rule and its effective date, if appropriate, based on input from state or local officials, or interested parties.

D. The interstate commission shall allow, not later than sixty (60) days after a rule is promulgated, any interested person to file a petition in the United States district court for the District of Columbia or in the federal district court where the interstate commission’s principal office is located for judicial review of such rule. If the court finds that the interstate commission’s action is not supported by substantial evidence in the rulemaking record, the court shall hold the rule unlawful and set it aside. For purposes of this subsection, evidence is substantial if it would be considered substantial evidence under the model state administrative procedures act.

E. If a majority of the legislatures of the compacting states rejects a rule, those states may, by enactment of a statute or resolution in the same manner used to adopt the compact, cause that such rule shall have no further force and effect in any compacting state.

F. The existing rules governing the operation of the interstate compact on juveniles superseded by this act shall be null and void twelve (12) months after the first meeting of the interstate commission created hereunder.

G. Upon determination by the interstate commission that a state-of-emergency exists, it may promulgate an emergency rule which shall become effective immediately upon adoption, provided that the usual rulemaking procedures provided hereunder shall be retroactively applied to said rule as soon as reasonably possible, but no later than ninety (90) days after the effective date of the emergency rule.



## ARTICLE VII

OVERSIGHT, ENFORCEMENT AND DISPUTE RESOLUTION BY THE  
INTERSTATE COMMISSION

## Section A. Oversight

1. The interstate commission shall oversee the administration and operations of the interstate movement of juveniles subject to this compact in the compacting states and shall monitor such activities being administered in noncompacting states which may significantly affect compacting states.

2. The courts and executive agencies in each compacting state shall enforce this compact and shall take all actions necessary and appropriate to effectuate the compact's purposes and intent. The provisions of this compact and the rules promulgated hereunder shall be received by all the judges, public officers, commissions, and departments of the state government as evidence of the authorized statute and administrative rules. All courts shall take judicial notice of the compact and the rules. In any judicial or administrative proceeding in a compacting state pertaining to the subject matter of this compact which may affect the powers, responsibilities or actions of the interstate commission, it shall be entitled to receive all service of process in any such proceeding, and shall have standing to intervene in the proceeding for all purposes.

## Section B. Dispute Resolution

1. The compacting states shall report to the interstate commission on all issues and activities necessary for the administration of the compact as well as issues and activities pertaining to compliance with the provisions of the compact and its bylaws and rules.

2. The interstate commission shall attempt, upon the request of a compacting state, to resolve any disputes or other issues which are subject to the compact and which may arise among compacting states and between compacting and noncompacting states. The commission shall promulgate a rule providing for both mediation and binding dispute resolution for disputes among the compacting states.

3. The interstate commission, in the reasonable exercise of its discretion, shall enforce the provisions and rules of this compact using any or all means set forth in article XI of this compact.

## ARTICLE VIII

## FINANCE

A. The interstate commission shall pay or provide for the payment of the reasonable expenses of its establishment, organization and ongoing activities.

B. The interstate commission shall levy on and collect an annual assessment from each compacting state to cover the cost of the internal operations and activities of the interstate commission and its staff which must be in a total amount sufficient to cover the interstate commission's annual budget as approved each year. The aggregate annual assessment amount shall be

allocated based upon a formula to be determined by the interstate commission, taking into consideration the population of each compacting state and the volume of interstate movement of juveniles in each compacting state and shall promulgate a rule binding upon all compacting states which governs said assessment.

C. The interstate commission shall not incur any obligations of any kind prior to securing the funds adequate to meet the same; nor shall the interstate commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state.

D. The interstate commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the interstate commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the interstate commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the interstate commission.

## ARTICLE IX

### THE STATE COUNCIL

Each member state shall create a state council for interstate juvenile supervision. While each state may determine the membership of its own state council, its membership must include at least one (1) representative from the legislative, judicial, and executive branches of government, victims groups, and the compact administrator, deputy compact administrator or designee. Each compacting state retains the right to determine the qualifications of the compact administrator or deputy compact administrator. Each state council will advise and may exercise oversight and advocacy concerning that state's participation in interstate commission activities and other duties as may be determined by that state including, but not limited to, development of policy concerning operations and procedures of the compact within that state.

## ARTICLE X

### COMPACTING STATES, EFFECTIVE DATE AND AMENDMENT

A. Any state, the District of Columbia (or its designee), the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands as defined in article II of this compact is eligible to become a compacting state.

B. The compact shall become effective and binding upon legislative enactment of the compact into law by no less than thirty-five (35) of the states. The initial effective date shall be the later of July 1, 2004, or upon enactment into law by the thirty-fifth jurisdiction. Thereafter it shall become effective and binding as to any other compacting state upon enactment of the compact into law by that state. The governors of nonmember states or their designees shall be invited to participate in the activities

of the interstate commission on a nonvoting basis prior to adoption of the compact by all states and territories of the United States.

C. The interstate commission may propose amendments to the compact for enactment by the compacting states. No amendment shall become effective and binding upon the interstate commission and the compacting states unless and until it is enacted into law by unanimous consent of the compacting states.

## ARTICLE XI

### WITHDRAWAL, DEFAULT, TERMINATION AND JUDICIAL ENFORCEMENT

#### Section A. Withdrawal

1. Once effective, the compact shall continue in force and remain binding upon each and every compacting state; provided that a compacting state may withdraw from the compact by specifically repealing the statute which enacted the compact into law.

2. The effective date of withdrawal is the effective date of the repeal.

3. The withdrawing state shall immediately notify the chairperson of the interstate commission in writing upon the introduction of legislation repealing this compact in the withdrawing state. The interstate commission shall notify the other compacting states of the withdrawing state's intent to withdraw within sixty (60) days of its receipt thereof.

4. The withdrawing state is responsible for all assessments, obligations and liabilities incurred through the effective date of withdrawal, including any obligations, the performance of which extends beyond the effective date of withdrawal.

5. Reinstatement following withdrawal of any compacting state shall occur upon the withdrawing state reenacting the compact or upon such later date as determined by the interstate commission.

#### Section B. Technical Assistance, Fines, Suspension, Termination and Default

1. If the interstate commission determines that any compacting state has at any time defaulted in the performance of any of its obligations or responsibilities under this compact, or the bylaws or duly promulgated rules, the interstate commission may impose any or all of the following penalties:

a. Remedial training and technical assistance as directed by the interstate commission;

b. Alternative dispute resolution;

c. Fines, fees, and costs in such amounts as are deemed to be reasonable as fixed by the interstate commission; and

d. Suspension or termination of membership in the compact, which shall be imposed only after all other reasonable means of securing compliance under the bylaws and rules have been exhausted and the interstate commission has therefore determined that the offending state is in default. Immediate notice of suspension shall be given by the interstate



commission to the governor, the chief justice or the chief judicial officer of the state, the majority and minority leaders of the defaulting state's legislature, and the state council. The grounds for default include, but are not limited to, failure of a compacting state to perform such obligations or responsibilities imposed upon it by this compact, the bylaws, or duly promulgated rules and any other grounds designated in commission bylaws and rules. The interstate commission shall immediately notify the defaulting state in writing of the penalty imposed by the interstate commission and of the default pending a cure of the default. The commission shall stipulate the conditions and the time period within which the defaulting state must cure its default. If the defaulting state fails to cure the default within the time period specified by the commission, the defaulting state shall be terminated from the compact upon an affirmative vote of a majority of the compacting states and all rights, privileges and benefits conferred by this compact shall be terminated from the effective date of termination.

2. Within sixty (60) days of the effective date of termination of a defaulting state, the commission shall notify the governor, the chief justice or chief judicial officer, the majority and minority leaders of the defaulting state's legislature, and the state council of such termination.

3. The defaulting state is responsible for all assessments, obligations and liabilities incurred through the effective date of termination including any obligations, the performance of which extends beyond the effective date of termination.

4. The interstate commission shall not bear any costs relating to the defaulting state unless otherwise mutually agreed upon in writing between the interstate commission and the defaulting state.

5. Reinstatement following termination of any compacting state requires both a reenactment of the compact by the defaulting state and the approval of the interstate commission pursuant to the rules.

#### Section C. Judicial Enforcement

The interstate commission may, by majority vote of the members, initiate legal action in the United States district court for the District of Columbia or, at the discretion of the interstate commission, in the federal district where the interstate commission has its offices, to enforce compliance with the provisions of the compact, its duly promulgated rules and bylaws, against any compacting state in default. In the event judicial enforcement is necessary the prevailing party shall be awarded all costs of such litigation including reasonable attorney's fees.

#### Section D. Dissolution of Compact

1. The compact dissolves effective upon the date of the withdrawal or default of the compacting state, which reduces membership in the compact to one (1) compacting state.

2. Upon the dissolution of this compact, the compact becomes null and void and shall be of no further force or effect, and the business and affairs of the interstate commission shall be concluded and any surplus funds shall be distributed in accordance with the bylaws.

## ARTICLE XII

## SEVERABILITY AND CONSTRUCTION

A. The provisions of this compact shall be severable, and if any phrase, clause, sentence or provision is deemed unenforceable, the remaining provisions of the compact shall be enforceable.

B. The provisions of this compact shall be liberally construed to effectuate its purposes.

## ARTICLE XIII

## BINDING EFFECT OF COMPACT AND OTHER LAWS

## Section A. Other Laws

1. Nothing herein prevents the enforcement of any other law of a compacting state that is not inconsistent with this compact.

2. All compacting states' laws other than state constitutions and other interstate compacts conflicting with this compact are superseded to the extent of the conflict.

## Section B. Binding Effect of the Compact

1. All lawful actions of the interstate commission, including all rules and bylaws promulgated by the interstate commission, are binding upon the compacting states.

2. All agreements between the interstate commission and the compacting states are binding in accordance with their terms.

3. Upon the request of a party to a conflict over meaning or interpretation of interstate commission actions, and upon a majority vote of the compacting states, the interstate commission may issue advisory opinions regarding such meaning or interpretation.

4. In the event any provision of this compact exceeds the constitutional limits imposed on the legislature of any compacting state, the obligations, duties, powers or jurisdiction sought to be conferred by such provision upon the interstate commission shall be ineffective and such obligations, duties, powers or jurisdiction shall remain in the compacting state and shall be exercised by the agency thereof to which such obligations, duties, powers or jurisdiction are delegated by law in effect at the time this compact becomes effective. [I.C., § 16-1901, as added by 2004, ch. 97, § 2, p. 341.]

## STATUTORY NOTES

**Prior Laws.** — Former § 16-1901, which comprised I.C. § 16-1901, as added by 1961, ch. 194, § 1, p. 289, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 3 of S.L. 2004,

ch. 97, provides: "This act shall become effective upon the enactment of the Interstate Compact for Juveniles into law by thirty-five states or July 1, 2004, whichever is later." On August 26, 2008, the governor of Illinois approved a bill making that state the 35th state to enact the compact into law and making the compact effective in Idaho on that date.

**16-1902. Short title.** — This act may be cited as the “Interstate Compact for Juveniles.” [I.C., § 16-1902, as added by 2004, ch. 97, § 2, p. 341.]

STATUTORY NOTES

**Prior Laws.** — Former § 16-1902, which comprised I.C. § 16-1902, as added by 1961, ch. 194, § 2, p. 289, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.

**Compiler’s Notes.** — The term “this act” refers to S.L. 2004, ch. 97, which is codified as §§ 16-1901 and 16-1902.

**Effective Dates.** — Section 3 of S.L. 2004, ch. 97, provides: “This act shall become effective upon the enactment of the Interstate Compact for Juveniles into law by thirty-five states or July 1, 2004, whichever is later.” On August 26, 2008, the governor of Illinois approved a bill making that state the 35th state to enact the compact into law and making the compact effective in Idaho on that date.

**16-1903. Execution of additional article. [Repealed.]**

STATUTORY NOTES

**Compiler’s Notes.** — This section, which comprised I.C. § 16-1903, as added by 1961, ch. 194, § 2A, p. 289, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.

**16-1904. Execution of amendment. [Repealed.]**

STATUTORY NOTES

**Compiler’s Notes.** — This section, which comprised I.C. § 16-1904, as added by 1961, ch. 194, § 2B, p. 289, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.

**16-1905. Juvenile compact administrator. [Repealed.]**

STATUTORY NOTES

**Compiler’s Notes.** — This section, which comprised I.C. § 16-1905, as added by 1961, ch. 194, § 3, p. 289, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.

**16-1906. Supplementary agreements. [Repealed.]**

STATUTORY NOTES

**Compiler’s Notes.** — This section, which comprised I.C. § 16-1906, as added by 1961, ch. 194, § 4, p. 289, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.

**16-1907. Financial arrangements. [Repealed.]**

STATUTORY NOTES

**Compiler’s Notes.** — This section, which comprised I.C. § 16-1907, as added by 1961, ch. 194, § 5, p. 289, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.



**16-1908. Financial responsibility of parents and guardians of estate. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C. § 16-1908, as added by 1961, ch. 194, § 6, p. 289, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.

**16-1909. Responsibilities of enforcement. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C. § 16-1909, as added by 1961, ch. 194, § 7, p. 289, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.

**16-1910. Clarification of term "delinquent juvenile". [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C. § 16-1910, as added by 1961, ch. 194, § 8, p. 289; 1995, ch. 44, § 63, p. 65, was repealed by S.L. 2004, ch. 97, § 1, effective August 26, 2008.

**CHAPTER 20**

**TERMINATION OF PARENT AND CHILD RELATIONSHIP**

**SECTION.**

- 16-2001. Purpose.
- 16-2002. Definitions.
- 16-2003. Jurisdiction.
- 16-2004. Petition — Who may file.
- 16-2005. Conditions under which termination may be granted.
- 16-2006. Content of petition.
- 16-2007. Notice — Waiver — Guardian ad litem.

**SECTION.**

- 16-2008. Investigation prior to disposition.
- 16-2009. Hearing.
- 16-2010. Decree.
- 16-2011. Effect of decree.
- 16-2012. Court costs.
- 16-2013. Records.
- 16-2014. Appeals.
- 16-2015. Construction.

**16-2001. Purpose.** — (1) The purpose of this chapter is to:

(a) Provide for voluntary and involuntary severance of the parent and child relationship and for substitution of parental care and supervision by judicial process, thereby safeguarding the rights and interests of all parties concerned and promoting their welfare and that of the state of Idaho; and

(b) Provide permanency for children who are under the jurisdiction of the court through the child protective act, chapter 16, title 16, Idaho Code, where the court has found the existence of aggravated circumstances or that reasonable efforts to return the child to his or her home have failed.

(2) Implicit in this chapter is the philosophy that wherever possible family life should be strengthened and preserved and that the issue of severing the parent and child relationship is of such vital importance as to require a judicial determination in place of attempts at severance by contractual arrangements, express or implied, for the surrender and relinquishment of children. Nothing in this chapter shall be construed to allow

discrimination in favor of, or against, on the basis of disability. [1963, ch. 145, § 1, p. 420; am. 2002, ch. 233, § 8, p. 666; am. 2005, ch. 391, § 46, p. 1263.]

JUDICIAL DECISIONS

ANALYSIS

Abandonment.  
Adult adoptions.  
Federal policy.  
Psychotherapy for parent.  
Termination of parental rights.

Abandonment.

Failure of a father to exercise custody and visitation rights for fear that his insistence on such rights, in view of the mother's attitude, would be detrimental to the child did not constitute abandonment of the child by failing to maintain a normal parental relationship. In re Matthews, 97 Idaho 99, 540 P.2d 284 (1975).

Adult Adoptions.

The parental termination statutes do not apply to adult adoptions for they expressly define the term "child" as "a person less than eighteen (18) years of age." Melling v. Chaney, 126 Idaho 554, 887 P.2d 1061 (1994).

Federal Policy.

The federal courts follow a long-standing policy to refrain from interfering in state domestic relations disputes. Tree Top v. Smith, 577 F.2d 519 (9th Cir. 1978).

Psychotherapy for Parent.

There is no requirement in this chapter that explicitly mandates psychotherapy for a parent before the state seeks termination of parental rights, and psychotherapy would not have been a reasonable option for the state to pursue before petitioning for termination of slightly mentally retarded mother's rights in light of the mother's disregard of the other efforts of assistance by the state. Brown v.

State, 112 Idaho 901, 736 P.2d 1355 (Ct. App. 1987).

Termination of Parental Rights.

Even though the father (who was incarcerated for lewd and lascivious conduct with a minor under 16 for his conduct with his adopted daughter) and his biological daughter shared a genuinely loving relationship, termination of the parent-child relationship was in the daughter's best interest as she would be well supported by her maternal great-aunt, would benefit from a sense of finality and comparative normalcy and permanency following termination and her pending adoption, and would be entitled to public financial benefits following the adoption. Termination was also in the father's best "psychological" interest in order to bring him closure and help him push past his delusions and seek the help he needed in psycho-sexual treatment. State v. Doe, 143 Idaho 383, 146 P.3d 649 (2006).

**Cited in:** Yearsley v. Yearsley, 94 Idaho 667, 496 P.2d 666 (1972); In re Andersen, 99 Idaho 805, 589 P.2d 957 (1978); State, Dep't of Health & Welfare v. Holt, 102 Idaho 44, 625 P.2d 398 (1981); Castro v. State Dep't of Health & Welfare, 102 Idaho 218, 628 P.2d 1052 (1981); Steve B.D. v. Swan, 112 Idaho 22, 730 P.2d 942 (1986); State v. Doe, 144 Idaho 839, 172 P.3d 1114 (2007).

RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, § 12 et seq.  
**A.L.R.** — Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights. 92 A.L.R.5th 379.

**16-2002. Definitions.** — When used in this chapter, unless the text otherwise requires:

- (1) "Court" means the district court or magistrate's division thereof or, if the context requires, a judge or magistrate thereof.
- (2) "Child" or "minor" means any individual who is under the age of eighteen (18) years.
- (3) "Neglected" means:

(a) Conduct as defined in section 16-1602(25), Idaho Code; or

(b) The parent(s) has failed to comply with the court's orders in a child protective act case or the case plan, and reunification of the child with his or her parent(s) has not occurred within the time standards set forth in section 16-1629(9), Idaho Code.

(4) "Abused" means conduct as defined in section 16-1602(1), Idaho Code.

(5) "Abandoned" means the parent has willfully failed to maintain a normal parental relationship including, but not limited to, reasonable support or regular personal contact. Failure of the parent to maintain this relationship without just cause for a period of one (1) year shall constitute prima facie evidence of abandonment under this section; provided however, where termination is sought by a grandparent seeking to adopt the child, the willful failure of the parent to maintain a normal parental relationship as provided herein without just cause for six (6) months shall constitute prima facie evidence of abandonment.

(6) "Legal custody" means status created by court order which vests in a custodian the following rights and responsibilities:

(a) To have physical custody and control of the child and to determine where and with whom the child shall live;

(b) To supply the child with food, clothing, shelter and incidental necessities;

(c) To provide the child with care, education and discipline; and

(d) To authorize medical, dental, psychiatric, psychological and other remedial care and treatment for the child, including care and treatment in a facility with a program of services for children;

provided that such rights and responsibilities shall be exercised subject to the powers, rights, duties and responsibilities of the guardian of the person.

(7) "Guardianship of the person" means those rights and duties imposed upon a person appointed as guardian of a minor under the laws of Idaho. It includes but is not necessarily limited either in number or kind to:

(a) The authority to consent to marriage, to enlistment in the armed forces of the United States, and to major medical, psychiatric and surgical treatment; to represent the minor in legal actions; and to make other decisions concerning the child of substantial legal significance;

(b) The authority and duty of reasonable visitation, except to the extent that such right of visitation has been limited by court order;

(c) The rights and responsibilities of legal custody except where legal custody has been vested in another individual or in an authorized child placement agency;

(d) When the parent and child relationship has been terminated by judicial decree with respect to the parents, or only living parent, or when there is no living parent, the authority to consent to the adoption of the child and to make any other decision concerning the child which the child's parents could make.

(8) "Guardian ad litem" means a person appointed by the court pursuant to section 16-1614 or 5-306, Idaho Code.

(9) "Authorized agency" means the department, a local agency, a person, an organization, corporation, benevolent society or association licensed or



approved by the department or the court to receive children for control, care, maintenance or placement.

(10) "Department" means the department of health and welfare and its authorized representatives.

(11) "Parent" means:

(a) The birth mother or the adoptive mother;

(b) The adoptive father;

(c) The biological father of a child conceived or born during the father's marriage to the birth mother; and

(d) The unmarried biological father whose consent to an adoption of the child is required pursuant to section 16-1504, Idaho Code.

(12) "Presumptive father" means a man who is or was married to the birth mother and the child is born during the marriage or within three hundred (300) days after the marriage is terminated.

(13) "Parent and child relationship" includes all rights, privileges, duties and obligations existing between parent and child, including inheritance rights, and shall be construed to include adoptive parents.

(14) "Parties" includes the child and the petitioners.

(15) "Unmarried biological father," as used in this chapter and chapter 15, title 16, Idaho Code, means the biological father of a child who was not married to the child's mother at the time the child was conceived or born.

(16) "Unmarried biological mother," as used in this chapter, means the biological mother of a child who was not married to the child's biological father at the time the child was conceived or born.

(17) "Disability" means, with respect to an individual, any mental or physical impairment which substantially limits one (1) or more major life activities of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning, or working, or a record of such an impairment, or being regarded as having such an impairment. Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual preference or orientation is not considered an impairment or disability. Whether an impairment substantially limits a major life activity shall be determined without consideration of the effect of corrective or mitigating measures used to reduce the effects of the impairment.

(18) "Adaptive equipment" means any piece of equipment or any item that is used to increase, maintain, or improve the parenting abilities of a parent with a disability.

(19) "Supportive services" means services which assist a parent with a disability to compensate for those aspects of their disability which affect their ability to care for their child and which will enable them to discharge their parental responsibilities. The term includes specialized or adapted training, evaluations, or assistance with effective use of adaptive equipment, and accommodations which allow a parent with a disability to benefit from other services, such as Braille texts or sign language interpreters. [1963, ch. 145, § 2, p. 420; am. 1971, ch. 266, § 1, p. 1067; am. 1972, ch. 196, § 3, p. 483; am. 1988, ch. 138, § 1, p. 249; am. 1990, ch. 26, § 1, p. 40; am.

1996, ch. 365, § 1, p. 1222; am. 2000, ch. 171, § 8, p. 422; am. 2002, ch. 233, § 9, p. 666; am. 2005, ch. 391, § 47, p. 1263.]

### STATUTORY NOTES

**Cross References.** — Guardians for minors, § 15-5-201 et seq.

**Effective Dates.** — Section 21 of S.L.

1972, ch. 196, provided that this act shall be in full force and effect on and after July 1, 1972.

### JUDICIAL DECISIONS

#### ANALYSIS

Abandonment.

Adult adoptions.

#### Abandonment.

The record contained substantial and competent evidence supporting a magistrate judge's findings of abandonment of the child by each parent based upon lack of contact and support of the child, their drug-related activities, and repeated incarcerations; termination of parental rights was in the child's best interest. *Doe v. Dep't of Health & Welfare (In re Doe)*, — Idaho —, 203 P.3d 689 (2009).

apply to adult adoptions for they expressly define the term "child" as "a person less than eighteen (18) years of age." *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

**Cited in:** *Dayley v. State, Dep't of Health & Welfare*, 112 Idaho 522, 733 P.2d 743 (1987); *Tanner v. State Dep't of Health & Welfare*, 120 Idaho 606, 818 P.2d 310 (1991); *Doe v. Roe (In re Doe)*, 142 Idaho 202, 127 P.3d 105 (2005).

#### Adult Adoptions.

The parental termination statutes do not

### RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, §§ 17-19.

**A.L.R.** — Parent's involuntary confinement, or failure to care for child as result

thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding. 79 A.L.R.3d 417.

**16-2003. Jurisdiction.** — The court shall have exclusive original jurisdiction, other than as provided in title 32, Idaho Code, to hear petitions to terminate the parent and child relationship when the child is present in the state. When a court has jurisdiction over the child under the child protective act, chapter 16, title 16, Idaho Code, that court shall have exclusive jurisdiction of the action to terminate parental rights unless it consents to a different venue or jurisdiction in the best interests of the child. [1963, ch. 145, § 3, p. 420; am. 2005, ch. 391, § 48, p. 1263.]

### RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, § 46 et seq.

**16-2004. Petition — Who may file.** — A petition may be filed by:

- a. Either parent when termination is sought with respect to the other parent.
- b. The guardian of the person or the legal custodian of the child or person standing in loco parentis to the child.
- c. An authorized agency.

d. Any other person possessing a legitimate interest in the matter. [1963, ch. 145, § 4, p. 420.]

JUDICIAL DECISIONS

**In General.**  
Temporary guardians of child had standing to file petition for termination of father's parental rights, in that they stood in loco parentis to child at time petition was filed.

*Craven v. Doe*, 128 Idaho 490, 915 P.2d 720 (1996).  
  
**Cited in:** *Doe v. Roe* (In re Doe), 142 Idaho 202, 127 P.3d 105 (2005).

RESEARCH REFERENCES

C.J.S. — 43 C.J.S., Infants, § 42.

**16-2005. Conditions under which termination may be granted. —**

(1) The court may grant an order terminating the relationship where it finds that termination of parental rights is in the best interests of the child and that one (1) or more of the following conditions exist:

- (a) The parent has abandoned the child.
- (b) The parent has neglected or abused the child.
- (c) The presumptive parent is not the biological parent of the child.
- (d) The parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals or well-being of the child.
- (e) The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority.

(2) The court may grant an order terminating the relationship and may rebuttably presume that such termination of parental rights is in the best interests of the child where:

- (a) The parent caused the child to be conceived as a result of rape, incest, lewd conduct with a minor child under the age of sixteen (16) years, or sexual abuse of a child under the age of sixteen (16) years, as defined in sections 18-6101, 18-1508, 18-1506 and 18-6602, Idaho Code;
- (b) The parent has subjected the child to torture, chronic abuse or sexual abuse, has committed murder or intentionally killed the other parent of the child, has committed murder or voluntary manslaughter of another child or has aided, abetted, conspired or solicited to commit such murder or voluntary manslaughter, and/or has committed battery which resulted in serious bodily injury to a child; or
- (c) The court determines the child to be an abandoned infant, except in a parental termination action brought by one (1) parent against another parent.

(3) The court may grant an order terminating the relationship if termination is found to be in the best interest of the parent and child.

(4) The court may grant an order terminating the relationship where a consent to termination in the manner and form prescribed by this chapter has been filed by the parent(s) of the child in conjunction with a petition for adoption initiated by the person or persons proposing to adopt the child, or where the consent to termination has been filed by a licensed adoption



agency, no subsequent hearing on the merits of the petition shall be held. Consents required by this chapter must be witnessed by a district judge or magistrate of a district court, or equivalent judicial officer of the state, where a person consenting resides or is present, whether within or without the county, and shall be substantially in the following form:

IN THE DISTRICT COURT OF THE .... JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ....

In the Matter of the termination )  
of the parental rights of )  
..... )  
..... )

I (we), the undersigned, being the .... of ....., do hereby give my (our) full and free consent to the complete and absolute termination of my (our) parental right(s), to the said ....., who was born ....., ....., unto ....., hereby relinquishing completely and forever, all legal rights, privileges, duties and obligations, including all rights of inheritance to and from the said ....., and I (we) do hereby expressly waive my (our) right(s) to hearing on the petition to terminate my (our) parental relationship with the said ....., and respectfully request the petition be granted.

DATED: ....., 20 ..  
.....

STATE OF IDAHO )  
 ) ss.  
COUNTY OF .... )

On this .... day of ....., 20 ....., before me, the undersigned ....., .... (Judge or Magistrate) of the District Court of the .... Judicial District of the state of Idaho, in and for the county of ....., personally appeared ....., known to me (or proved to me on the oath of ....) to be the person(s) whose name(s) is (are) subscribed to the within instrument, and acknowledged to me that he (she, they) executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

..... (District Judge or Magistrate)

The court shall accept a consent or a surrender and release executed in another state if:

- (1) It is witnessed by a magistrate or district judge of the state where signed; or
- (2) The court receives an affidavit or a certificate from a court of comparable jurisdiction stating that the consent or the surrender and release was executed in accordance with the laws of the state in which it was executed, or the court is satisfied by other showing that the consent or surrender and release was executed in accordance with the laws of the state in which it was executed; or
- (3) The court shall accept a termination or relinquishment from a sister state that has been ordered by a court of competent jurisdiction under like proceedings; or in any other manner authorized by the laws of a sister

state. In a state where the father has failed to file notice of claim to paternity and willingness to assume responsibility as provided for pursuant to the laws of such state, and where such failure constitutes an abandonment of such child and constitutes a termination or relinquishment of the rights of the putative father, the court shall accept such failure as a termination in this state without further hearing on the merits, if the court is satisfied that such failure constitutes a termination or relinquishment of parental rights pursuant to the laws of that state.

(5) Unless a consent to termination signed by the parent(s) of the child has been filed by an adoption agency licensed in the state of Idaho, or unless the consent to termination was filed in conjunction with a petition for adoption of the child, the court shall hold a hearing.

(6) If the parent has a disability, as defined in this chapter, the parent shall have the right to provide evidence to the court regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child. Nothing in this section shall be construed to create any new or additional obligation on state or local governments to purchase or provide adaptive equipment or supportive services for parents with disabilities. [1963, ch. 145, § 5, p. 420; am. 1971, ch. 266, § 2, p. 1067; am. 1987, ch. 207, § 1, p. 436; am. 1990, ch. 25, § 1, p. 38; am. 1994, ch. 393, § 4, p. 1243; am. 1994, ch. 426, § 2, p. 1334; am. 1996, ch. 365, § 2, p. 1222; am. 1998, ch. 310, § 1, p. 1028; am. 1999, ch. 314, § 1, p. 779; am. 2000, ch. 77, § 1, p. 161; am. 2000, ch. 171, § 9, p. 422; am. 2002, ch. 233, § 10, p. 666; am. 2003, ch. 260, § 1, p. 683; am. 2005, ch. 391, § 49, p. 1263.]

### STATUTORY NOTES

**Cross References.** — “Mentally ill” defined, § 66-317.

**Amendments.** — This section was amended by two 1994 acts which appear to be compatible and have been compiled together.

The 1994 amendment, by ch. 393, added the present subdivision g and redesignated former subdivision g as present subdivision h.

The 1994 amendment, by ch. 426, in the first sentence of subdivision a added “willfully” preceding “failed to maintain”; added the last sentence of subdivision a; and added another subdivision h which has been designated as “[i.]” by the compiler.

This section was amended by two 2000 acts which appear to be compatible and have been compiled together.

The 2000 amendment, by ch. 77, in the introductory language, inserted “(1)” following “one”; at the end of subdivision j.(1), added “or”, in subdivision j.(2), added “if the court determines the parent has been convicted of murder or voluntary manslaughter of another sibling of the child or has aided, abetted, conspired or solicited to commit such murder or voluntary manslaughter and/or if the court determines the parent has been convicted of a

felony assault or battery which resulted in serious bodily injury to the child or a sibling; or”, at the end of subdivision j.(3), added “or”, and added subdivision j.(4).

The 2000 amendment, by ch. 171, in the introductory language, inserted “(1)” following “one”; in the paragraphs following subdivision f. substituted “..” for “19”; deleted former subdivision g. which read: “Where consent to termination of parental rights is implied by reason of the failure of a putative father to establish paternity in the manner prescribed in section 16-1513, Idaho Code”; redesignated former subdivision h. as present subdivision g.; deleted former subdivision i. which read: “In the case of a father’s parental relationship, where the father has failed to file notice of claim to paternity and willingness to assume responsibility as provided in section 16-1513(3), Idaho Code”; redesignated former subdivision j. as present subdivision h., and in concluding language, substituted “subsection h.” for “subsection j.”

**Effective Dates.** — Section 3 of S.L. 1971, ch. 266 declared an emergency. Approved March 25, 1971.

Section 2 of S.L. 1999, ch. 314 declared an emergency. Approved March 24, 1999.

## JUDICIAL DECISIONS

## ANALYSIS

Abandonment.  
Abuse of child.  
Appellate review.  
Best interests of child.  
Best interests of parent.  
Consideration of parent's past.  
Constitutionality.  
Effectiveness of counsel.  
Finding of court.  
Independent grounds.  
Informal relinquishing of custody.  
Mentally deficient parent.  
Mentally retarded mother.  
Neglect.  
Notice.  
Procedure.  
Rehabilitation of parents.  
Standard of proof.  
Termination improper.  
Termination proper.  
— Participation.  
— Validity.

**Abandonment.**

Evidence that a father, after a divorce in which custody of his children was awarded to his wife and after the wife's remarriage and removal to the state of Connecticut, failed to make substantial contribution to their support, to visit them, or to make sufficient inquiry of their whereabouts to locate them was sufficient to sustain a finding that such father had abandoned his children. *Clark v. Jelinek*, 90 Idaho 592, 414 P.2d 892 (1966).

The standards prescribed by this section for determining abandonment are not applicable to that term in an adoption proceeding and the children of a divorced father could not be adopted by their mother's subsequent husband without their father's consent on the ground that he had abandoned them by failure to maintain a normal parental relationship. *Clayton v. Jones*, 91 Idaho 87, 416 P.2d 34 (1966).

Though failure of a parent to maintain the normal parental relationship without just cause for a period of over one year is prima facie evidence of abandonment, the burden of persuasion of abandonment remains with the petitioner who seeks to terminate the parent-child relationship. *In re Matthews*, 97 Idaho 99, 540 P.2d 284 (1975).

Failure of a father to exercise custody and visitation rights for fear that his insistence on such rights, in view of the mother's attitude, would be detrimental to the child did not constitute abandonment of the child by failing to maintain a normal parental relationship. *In re Matthews*, 97 Idaho 99, 540 P.2d 284 (1975).

Father's failure to provide any support for his children or to make any real attempt to communicate with them for over one year, despite the fact that he knew their mother was unable to care for them and that they had been placed in foster care, was sufficient evidence to support a finding of abandonment. *Crum v. State*, Dep't of Health & Welfare, 111 Idaho 407, 725 P.2d 112 (1986).

Where the trial court finds that abandonment is established by clear and convincing evidence, those findings will not be overturned on appeal unless they are clearly erroneous; clear error will not be deemed to exist where the findings are supported by substantial and competent, albeit conflicting, evidence. *Crum v. State*, Dep't of Health & Welfare, 111 Idaho 407, 725 P.2d 112 (1986).

Substantial and competent evidence supported termination of father's parental rights where grounds of abandonment and neglect existed and termination was in the best interests of parent and child. *Craven v. Doe*, 128 Idaho 490, 915 P.2d 720 (1996).

Where the father was in prison when his child was born and had never seen his child or provided financial support for him, but after learning of the child's birth, he sent the child several Christmas gifts, tried to speak with the child's mother and maternal grandmother, wrote to the grandmother without receiving a response, signed documents authorizing medical treatment for the child, contacted the caseworker a number of times, and wrote a letter to the magistrate court indicating that he did not want his parental rights terminated, and the mother's parental



rights were already terminated, the father's failure to complete the "rider" program after the child was born and get out of prison early was not substantial competent evidence that supported a finding by clear and convincing evidence of abandonment; the father's efforts to maintain a relationship with the child had to be judged in terms of the reality of his imprisonment and not trivialized. *Doe v. State*, 137 Idaho 758, 53 P.3d 341 (2002).

Order terminating father's rights was reversed where the magistrate judge failed to adequately consider the father's evidence that the lack of a normal parental relationship was not without just cause. There was no consideration of the distance between the parties or the fact that the father had missed work due to injuries and was heavily in debt. *Roe v. Doe* (In re Doe), 143 Idaho 188, 141 P.3d 1057 (2006).

### **Abuse of Child.**

Where evidence indicated that plaintiff's daughter was subjected to extensive, long-term mistreatment, that plaintiff was aware of wife striking daughter and had admitted that fact to deputy sheriff, there was sufficient evidence to terminate parental rights to the child under this section, since plaintiff at the very least acquiesced to the physical abuse of his daughter and failed to take any preventive measures to assure the child's future protection. *Castro v. State Dep't of Health & Welfare*, 102 Idaho 218, 628 P.2d 1052 (1981).

### **Appellate Review.**

Where, in an action to terminate parental rights, the burden of proving neglect by clear and convincing evidence has been noted explicitly and applied by the trial judge, the appellate court will not disturb the trial court's findings unless they are unsupported by substantial evidence. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

A parent-child relationship may be terminated by the court when it finds that the parent has neglected or abused the child or that termination is found to be in the best interests of the parent and child; on appeal the supreme court will not disturb those findings, if they are supported by substantial and competent evidence. *Dayley v. State, Dep't of Health & Welfare*, 112 Idaho 522, 733 P.2d 743 (1987).

There was substantial and competent, albeit conflicting, evidence to affirm the finding of the magistrate court that it was in the best interests of the children to terminate the parental rights of the parents. That evidence included findings by the magistrate that: (1) one child had difficulties with speech and suffered from attention deficit hyperactivity disorder and reactive attachment disorder, while the other child was significantly de-

layed in development, both physically and mentally; (2) the children had been removed from the home due to physical abuse, unsanitary conditions, and repeated reports of poor parenting; (3) the parents had a lack of recognition of the problems that brought the children to the attention of child protection services and an unwillingness to make changes necessary to allow reunification to occur; and (4) the parents lacked knowledge related to basic day-to-day care, parenting and behavior management coupled with the unwillingness or inability to utilize what they have been taught to improve the quality of their children's life experiences. *Doe v. Dep't of Health & Welfare*, 141 Idaho 511, 112 P.3d 799 (2005).

### **Best Interests of Child.**

The best interests of the parent must be considered only when terminating the relationship under subsection (3); however, the best interests of the child must be considered when terminating the relationship under any provision of this section. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

Where the children's behavior and school work generally improved while they were living away from the mother, the children themselves told the judge that they felt insecure at their mother's home and did not want to live there, and the caseworker stated that the children needed a permanent, stable living arrangement that the mother had been unable to provide, the magistrate's finding that termination of the mother's parental rights was in the children's best interests was supported by substantial evidence and had to be sustained on appeal. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

The finding that reuniting the family would be extremely remote falls within the condition permitting termination in the best interests of the parent and child. *Dayley v. State, Dep't of Health & Welfare*, 112 Idaho 522, 733 P.2d 743 (1987).

Once a statutory ground for termination is found, the magistrate must then decide what is in the best interest of the child. *Doe v. State, Dep't of Health & Welfare*, 123 Idaho 502, 849 P.2d 963 (Ct. App. 1993).

Where mother failed to complete her chemical dependency program, continued to use drugs, refused to obey a curfew, and committed many other probation violations, the evidence supported the magistrate's conclusion that the best interests of the child required that the parental rights be terminated. *State v. Doe*, 133 Idaho 826, 992 P.2d 1226 (Ct. App. 1999).

There is no requirement that a party seeking termination of parental rights present expert testimony to support the assertion that termination would be in the best interests of

the child. *Doe v. Roe*, 133 Idaho 805, 992 P.2d 1205 (1999).

### **Best Interests of Parent.**

While the best interests of the child must be considered when terminating the parent-child relationship under all provisions of this section, the best interests of the parent need not be considered unless termination is considered under subsection (e) [now (3)] of this section. *Doe v. Roe*, 133 Idaho 805, 992 P.2d 1205 (1999).

Consideration of best interests of mother was not required because once the trial court determined that termination of parental rights was proper under subsection (b) [now (1)(b)], there was no need to consider the merits of a claim under subsection (e) [now (3)]. *Doe v. Roe*, 133 Idaho 805, 992 P.2d 1205 (1999).

### **Consideration of Parent's Past.**

The trial court did not abuse its discretion in considering the father's past along with other relevant evidence, where the evidence of the father's past was considered in determining whether he would be a neglectful parent at the present time and in the future. *Dayley v. State*, Dep't of Health & Welfare, 112 Idaho 522, 733 P.2d 743 (1987).

Magistrate court's decision to terminate mother's parental rights due to neglect properly focused on past as well as current conditions and was supported by substantial and competent evidence. *State v. Doe*, 144 Idaho 839, 172 P.3d 1114 (2007).

### **Constitutionality.**

This section is not unconstitutionally vague. *Doe v. Doe* (In re Doe), 138 Idaho 893, 71 P.3d 1040 (2003).

### **Effectiveness of Counsel.**

Counsel's decision not to call the mother to the stand and his option to argue rehabilitation rather than lack of evidence to support a finding of abuse were tactical decisions, and strategic and tactical decisions of counsel do not sustain a charge of ineffective counsel. *State*, Dep't of Health & Welfare v. Mahoney-Williams, 101 Idaho 280, 611 P.2d 1065 (1980).

### **Finding of Court.**

In a proceeding to terminate a parent-child relationship, the due process clause mandates that the grounds for termination must be shown by clear and convincing evidence and where trial court finds that the grounds as defined by statute, which are alleged for termination, are established by clear and convincing evidence, these findings will not be overturned on appeal unless they are clearly erroneous and clear error will not be deemed to exist where the findings are supported by substantial and competent evidence, albeit,

conflicting evidence. Also, the appellate court in reviewing such findings will indulge in all reasonable inferences in support of the trial court's judgment. *State*, Dep't of Health & Welfare v. Doe, 130 Idaho 47, 936 P.2d 690 (Ct. App. 1997).

### **Independent Grounds.**

The statutory grounds for termination under this section are independent and, if any one or more of the grounds for termination are found, termination may be granted. *Doe v. State*, Dep't of Health & Welfare, 123 Idaho 502, 849 P.2d 963 (Ct. App. 1993).

### **Informal Relinquishing of Custody.**

A parent is not relieved of his or her responsibility to provide appropriate parental care by informally relinquishing custody of a child to a relative or friend. *Thompson v. Thompson*, 110 Idaho 93, 714 P.2d 62 (Ct. App. 1986).

### **Mentally Deficient Parent.**

Where a petition for termination alleges mental deficiency of the parent as a ground for termination under this section, the court shall appoint a guardian ad litem for the alleged incompetent parent. *State v. Doe*, 123 Idaho 562, 850 P.2d 211 (Ct. App. 1993).

In a termination of parental rights proceeding, the court's conclusion that the father's mental illness was not a defense to termination was not clear error. *Doe v. Doe* (In re Doe), 138 Idaho 893, 71 P.3d 1040 (2003).

Substantial evidence supported the decision to terminate a mother's parental rights where the caseworker's testimony showed that the mother had failed to attend and apply knowledge gained from a parenting class, obtain substance abuse education, or comply with a psychologist's mental health recommendations as required by a parenting plan, and the psychological reports showed that she had been diagnosed with several mental disorders that required consistent care. *Dep't of Health & Welfare v. Doe* (In re Termination of Parental Rights Regarding Doe), 144 Idaho 312, 160 P.3d 751 (2007).

### **Mentally Retarded Mother.**

Termination of a slightly mentally retarded mother's parental rights to her two children would be upheld in view of evidence that the children were abused, neglected, and abandoned, that, because of the mother's inability or lack of desire, there appeared to be little or no chance of improvement in conditions for the children, and that the mother, although she expressed love for her children, was barely able to provide basic care for herself, let alone her children. *Brown v. State*, 112 Idaho 901, 736 P.2d 1355 (Ct. App. 1987).

### **Neglect.**

Nothing in the statutory definition of "neglect" suggests that a child must suffer de-



monstrable harm before the parent-child relationship can be terminated; it is sufficient that the child lacks parental care necessary for his health, morals and well-being. The termination statutes of this state exist not merely to alleviate harm but to prevent it. *State, Dep't of Health & Welfare v. Cheatwood*, 108 Idaho 218, 697 P.2d 1232 (Ct. App. 1985).

Whether neglect has occurred is a question of fact, to be determined in the first instance by the trial judge upon a constitutionally mandated standard of clear and convincing evidence; when neglect has been found upon this standard, the judge's finding — like any finding of fact — is reviewable upon the appellate standard of substantial evidence. *State, Dep't of Health & Welfare v. Cheatwood*, 108 Idaho 218, 697 P.2d 1232 (Ct. App. 1985).

Where the acts by which the natural mother initially became noncustodial, as well as her conduct thereafter, are the very acts constituting neglect, her conduct toward the child would not be evaluated solely in terms of a noncustodial parent. *Thompson v. Thompson*, 110 Idaho 93, 714 P.2d 62 (Ct. App. 1986).

Termination for parental neglect under subdivision b [now (1)(b)] of this section is not contingent upon a showing that the parent will somehow benefit. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

Where the mother failed to provide the parental care necessary for the children's health, morals and well-being, the magistrate's finding that the mother had neglected her daughters was supported by substantial evidence and would not be disturbed. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

Substantial and competent evidence was presented to support the magistrate's determination that the mother had neglected the children by failing to provide parental care necessary for the health, morals and well-being of the children. *Doe v. State, Dep't of Health & Welfare*, 123 Idaho 502, 849 P.2d 963 (Ct. App. 1993).

Neglect is a permissible ground for termination even where the parent being terminated is a noncustodial parent. *State v. Doe*, 133 Idaho 826, 992 P.2d 1226 (Ct. App. 1999).

Magistrate did not err by dismissing the Idaho department of health and welfare's petition to terminate parental rights where there was no clear and convincing evidence to support the termination based on neglect; the evidence showed that the parent attempted to contact the children, sent them gifts, and provided child support payments. *State Dep't of Health & Welfare v. Roe* (In the Interest of Doe), 139 Idaho 18, 72 P.3d 858 (2003).

Substantial and competent evidence supported the trial court's conclusion that the

father neglected his child where he failed to provide the parental care necessary for the child's health, morals, and well-being; the trial court properly considered relevant evidence about the father's behavior and treatment of his son, he was granted visitation rights with his child, and the father's visitation with his child was sporadic and infrequent and the father also failed to provide for his child's health insurance or medical costs. *Roe v. Doe* (In re Termination of the Parental Rights of Doe), 142 Idaho 174, 125 P.3d 530 (2005).

Father's parental rights were properly terminated on grounds of neglect, where the father actively encouraged the child's mother to take drugs and findings about his parenting skills were supported by substantial competent evidence; the father failed to provide care and it was in the child's best interests for his rights to be terminated. *Casi Found., Inc. v. Doe* (In re Doe), 142 Idaho 397, 128 P.3d 934 (2006).

There was sufficient evidence to support a finding that the father neglected his daughter, and, therefore, the magistrate judge properly terminated the father's parental rights; the father's neglect, violence and drinking had a highly detrimental effect and there was no point in further considering reunification. *State v. Doe* (In re Doe), — Idaho —, 144 P.3d 597 (2006).

Magistrate's finding that a mother neglected her children was supported by substantial and competent evidence where the mother had been completely noncompliant with her case plan until her release from incarceration, and, upon release, the mother merely complied with the terms of her probation rather than the terms of her case plan, and there were several enumerated specific instances of neglect. *State v. Doe* (In re Doe), 145 Idaho 662, 182 P.3d 1196 (2008).

#### Notice.

Where the state's petition made reference to the father's failure to comply with the agreement for reuniting the family, the father's failure to cooperate in providing care and a stable home environment for the child, and the state's belief that the best interests of the child would be served by terminating the father's parental rights, the father was provided adequate notice that the state was seeking to terminate his parental rights. *Dayley v. State, Dep't of Health & Welfare*, 112 Idaho 522, 733 P.2d 743 (1987).

Application of this section in a termination of parental rights proceeding did not result in a violation of the father's due process rights. The state provided adequate notice that it was seeking to terminate his parental rights. *Doe v. Doe* (In re Doe), 138 Idaho 893, 71 P.3d 1040 (2003).



**Procedure.**

It is not necessary that the state allege precisely which of the provisions of this section under which it is proceeding; a simple and concise statement of the facts is all that is necessary. *Dayley v. State, Dep't of Health & Welfare*, 112 Idaho 522, 733 P.2d 743 (1987).

**Rehabilitation of Parents.**

The magistrate did not err in not making a finding as to whether the parents could or could not have been rehabilitated prior to a termination of their parental rights. *Bush v. Phillips*, 113 Idaho 873, 749 P.2d 492 (1988).

**Standard of Proof.**

The standard of proof required for termination of parental rights, "clear and convincing" evidence, is not affected by the private or public nature of the party seeking termination. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

**Termination Improper.**

Where a child was out of the mother's care for 18 of the last 22 months, despite its reluctance, the department of health and welfare was obligated under the law to file a petition for termination of parental rights, but, the magistrate court's order terminating the mother's parental rights was clearly erroneous. The magistrate erred in focusing on the mother's conviction and past criminal behavior while dismissing relevant and competent evidence such as the social worker's testimony and that reunification was possible and was occurring. *State v. Roe (In re Doe)*, 142 Idaho 594, 130 P.3d 1132 (2006).

**Termination Proper.**

A magistrate correctly ordered the parent-child relationship terminated based on his findings that (1) the mother had physically abused the child; (2) the mother had neglected the child; (3) the mother and her husband had been dishonest with the department of health and welfare and had attempted to cover up their physical abuse of the child; (4) the parents' prognosis for improving their parenting ability was poor; and (5) the child had bonded with her foster mother and would experience trauma and further developmental delay if she were removed from her foster mother's care. *Rhodes v. State, Dep't of Health & Welfare*, 107 Idaho 1120, 695 P.2d 1259 (1985).

Where father had neglected his children, failed to provide adequate voluntary support and had no realistic plans for their care, the magistrate court determined father had neglected and abused his children and that it was in the best interest of the children that his parental rights be terminated. *Tanner v. State Dep't of Health & Welfare*, 120 Idaho 606, 818 P.2d 310 (1991).

The facts indicated that when under the mother's care, children were in an unstable, unnurturing and dangerous environment; therefore, the trial court found sufficient evidence to support termination of the mother's parental rights based on the conclusion that she had neglected the children and that the children's best interests would be served by termination. *Doe v. State, Dep't of Health & Welfare*, 122 Idaho 644, 837 P.2d 319 (Ct. App. 1992).

Substantial evidence supported court's decision to terminate father's parental rights upon a finding of abandonment. The mother presented evidence that he had no contact with the minor child for over two years, he stated he wasn't ready to start raising a family, and he gave no support to the minor child apart from an isolated gift. *Doe v. Doe (In re Doe)*, 138 Idaho 893, 71 P.3d 1040 (2003).

Court determined that biological father had no cognizable parental rights, where he had not had his paternity established by court decree, he had never filed an acknowledgement of paternity with vital statistics, he had not filed an acknowledgement of paternity, commenced paternity proceedings, or provided any monetary support toward the mother's pregnancy, he was clearly aware of the strong possibility that he was the child's father, particularly when the child was born nine months after he had engaged in sexual relations with the mother, and he had done nothing to affirmatively establish a relationship with the child. *Doe v. Roe (In re Doe)*, 142 Idaho 202, 127 P.3d 105 (2005).

Even though the father (who was incarcerated for lewd and lascivious conduct with a minor under 16 for his conduct with his adopted daughter) and his biological daughter shared a genuinely loving relationship, termination of the parent-child relationship was in the daughter's best interest as she would be well supported by her maternal great-aunt, would benefit from a sense of finality and comparative normalcy and permanency following termination and her pending adoption, and would be entitled to public financial benefits following the adoption. Termination was also in the father's best "psychological" interest in order to bring him closure and help him push past his delusions and seek the help he needed in psycho-sexual treatment. *State v. Doe*, 143 Idaho 383, 146 P.3d 649 (2006).

**—Participation.**

Where none of the consents to terminate parental rights complied with Indian Child Welfare Act's (ICWA) statutory formalities, and the order of June 1990 terminating the mother's parental rights was invalid, the mother's parental rights were not terminated,

and she had standing to participate in adoption placement proceedings. *Doe v. Roe*, 127 Idaho 452, 902 P.2d 477 (1995).

invalid. *Doe v. Roe*, 127 Idaho 452, 902 P.2d 477 (1995).

**— Validity.**  
Where termination order was conditional; as it terminated the mother’s parental rights only in favor of the adoptive parents, it was

**Cited in:** *State ex rel. Child v. Clouse*, 93 Idaho 893, 477 P.2d 834 (1970); *Doe v. Dep’t of Health & Welfare (In re Doe)*, — Idaho —, 203 P.3d 689 (2009).

RESEARCH REFERENCES

**A.L.R.** — Parents’ mental illness or mental deficiency as ground for termination of parental rights — Issues concerning guardian ad litem and counsel. 118 A.L.R.5th 561.  
Parents’ mental illness or mental deficiency as ground for termination of parental rights

— Applicability of Americans With Disabilities Act. 119 A.L.R.5th 351.  
Parents’ mental illness or mental deficiency as ground for termination of parental rights — Evidentiary issues. 122 A.L.R.5th 385.

**16-2006. Content of petition.** — The petition for the termination of the parent and child relationship shall include, to the best information and belief of the petitioner:

- a. The name and place of residence of the petitioner;
- b. The name, sex, date and place of birth, and residence of the child;
- c. The basis for the court’s jurisdiction;
- d. The relationship of the petitioner to the child, or the fact that no relationship exists;
- e. The names, addresses, and dates of birth of the parents; and where the child is illegitimate, the names, addresses and dates of birth of both parents, if known to the petitioner;
- f. Where the child’s parent is a minor, the names and addresses of said minor’s parents or guardian of the person; and where the child has no parent or guardian, the relatives of the child to and including the second degree of kindred;
- g. The name and address of the person having legal custody or guardianship of the person or acting in loco parentis to the child or authorized agency having legal custody or providing care for the child;
- h. The grounds on which termination of the parent and child relationship is sought;
- i. The names and addresses of the persons and authorized agency or officer thereof to whom or to which legal custody or guardianship of the person of the child might be transferred;
- j. A list of the assets of the child together with a statement of the value thereof. [1963, ch. 145, § 6, p. 420.]

JUDICIAL DECISIONS

**Cited in:** *In re Andersen*, 99 Idaho 805, 589 P.2d 957 (1978).

RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, § 42.

**16-2007. Notice — Waiver — Guardian ad litem.** — (1) After a petition has been filed, the court shall set the time and place for hearing. The petitioner shall give notice to any person entitled to notice under section 16-1505, Idaho Code, the authorized agency having legal custody of the child and the guardian ad litem of the child and of a parent. The petitioner shall give notice to the Idaho department of health and welfare if the petition for termination was not filed in conjunction with a petition for adoption or by an adoption agency licensed by the state of Idaho.

(2) Notice shall be given by personal service on the parents or guardian. Where reasonable efforts to effect personal service have been unsuccessful or are impossible because the whereabouts of parties entitled to notice are not known or reasonably ascertainable, the court shall order service by registered or certified mail to the last known address of the person to be notified and by publication once a week for three (3) successive weeks in a newspaper or newspapers to be designated by the court as most likely to give notice to the person to be served. The hearing shall take place no sooner than ten (10) days after service of notice, or where service is by registered or certified mail and publication, the hearing shall take place no sooner than ten (10) days after the date of last publication.

(3) Notice and appearance may be waived by a parent in writing and witnessed by a district judge or magistrate of a district court, or equivalent judicial officer of the state, where a person waiving notice and appearance resides or is present, whether within or without the county, and shall be substantially in the following form:

IN THE DISTRICT COURT OF THE .... JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ....

In the Matter of the termination )  
of the parental rights to )  
..... )  
..... )

(a) minor child(ren)

I (we), the undersigned, being the .... of ....., do hereby waive my (our) right to notice and my (our) right to appear in any action seeking termination of my (our) parental rights. I (we) understand that by waiving notice and appearance my (our) parental right(s), to the said ....., who was born ....., ..., unto ....., may be completely and forever terminated, including all legal rights, privileges, duties and obligations, including all rights of inheritance to and from the said ....., and I (we) do hereby expressly waive my (our) right(s) to notice of or appearance in any such action.

DATED: ....., 20 ....  
.....

STATE OF IDAHO )  
 ) ss.  
COUNTY OF .... )

On this .... day of ....., 20...., before me, the undersigned ....., .....  
(Judge or Magistrate) of the District Court of the ..... Judicial District of



the state of Idaho, in and for the county of ....., personally appeared ....., known to me (or proved to me on the oath of .....) to be the person(s) whose name(s) is (are) subscribed to the within instrument, and acknowledged to me that he (she, they) executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

..... (District Judge or Magistrate)

(4) The court shall accept a waiver of notice and appearance executed in another state if:

(a) It is witnessed by a magistrate or district judge of the state where signed; or

(b) The court receives an affidavit or a certificate from a court of comparable jurisdiction stating that the waiver of notice and appearance was executed in accordance with the laws of the state in which it was executed, or the court is satisfied by other showing that the waiver of notice and appearance was executed in accordance with the laws of the state in which it was executed.

(5) When the termination of the parent and child relationship is sought and the parent is determined to be incompetent to participate in the proceeding, the court shall appoint a guardian ad litem for the alleged incompetent parent. The court may in any other case appoint a guardian ad litem, as may be deemed necessary or desirable, for any party. Where the putative father has failed to timely commence proceedings to establish paternity under section 7-1111, Idaho Code, and by filing with the vital statistics unit of the department of health and welfare, notice of his commencement of proceedings to establish his paternity of the child born out of wedlock, notice under this section is not required unless such putative father is one of those persons specifically set forth in section 16-1505(1), Idaho Code.

(6) If a parent fails to file a claim of parental rights pursuant to the provisions of chapter 82, title 39, Idaho Code, for a child left with a safe haven pursuant thereto, prior to entry of an order terminating their parental rights, that parent is deemed to have abandoned the child and waived and surrendered any right in relation to the child, including the right to notice of any judicial proceeding in connection with the termination of parental rights. [1963, ch. 145, § 7, p. 420; am. 1987, ch. 207, § 2, p. 436; am. 1990, ch. 58, § 1, p. 134; am. 2000, ch. 171, § 10, p. 422; am. 2001, ch. 357, § 6, p. 1252; am. 2002, ch. 233, § 11, p. 666; am. 2005, ch. 25, § 80, p. 82; am. 2005, ch. 391, § 50, p. 1263.]

#### STATUTORY NOTES

**Amendments.** — This section was amended by two 2005 acts which appear to be compatible and have been compiled together.

The 2005 amendment, by ch. 25, corrected a citation in present subsection (6).

The 2005 amendment, by ch. 291, made the same correction as in ch. 25, and extensively rewrote the section, adding the subsection designations and the form in subsection (3).

## JUDICIAL DECISIONS

## ANALYSIS

Applicability.

Constitutionality.

—Due process.

Discretion of court.

Guardian ad litem.

—Mental deficiency of parent.

**Applicability.**

In circumstances where the father and the mother both acknowledge who the biological father is and the father is willing to accept the rights and responsibilities of paternity, the provisions of §§ 16-2007 and 16-1505 apply; if, on the other hand, the mother does not join in the acknowledgment of paternity, then the father is required to follow the mandates of § 16-1513 and file proceedings for paternity and a notice with the bureau of vital records and health statistics. *Roe Family Servs. v. Doe* (In re Baby Boy Doe), 139 Idaho 930, 88 P.3d 749 (2004).

**Constitutionality.****—Due Process.**

Father's claim that he was deprived of due process due to fact that he did not receive notice until after second amended petition for termination of parental rights was filed was without merit, as issue was not preserved on intermediate appeal to district court. *Craven v. Doe*, 128 Idaho 490, 915 P.2d 720 (1996).

It was error to terminate a biological father's parental rights based on his failure to file and register his notice of commencement of paternity proceedings under § 16-1513, because the father and mother had filled out and had notarized a paternity affidavit requesting that he be listed as the father on the

child's birth certificate; it was, therefore unnecessary for him to file a paternity action, he was the biological father of the child and, pursuant to this section, he was entitled to have had notice of the termination hearing. *Roe Family Servs. v. Doe* (In re Baby Boy Doe), 139 Idaho 930, 88 P.3d 749 (2004).

**Discretion of Court.**

Appointment of a guardian ad litem to the child is within the discretion of the trial court. *Dayley v. State, Dep't of Health & Welfare*, 112 Idaho 522, 733 P.2d 743 (1987).

**Guardian Ad Litem.****—Mental Deficiency of Parent.**

Where a petition for termination alleges mental deficiency of the parent as a ground for termination under § 16-2005, the court shall appoint a guardian ad litem for the alleged incompetent parent. *State v. Doe*, 123 Idaho 562, 850 P.2d 211 (Ct. App. 1993).

In a proceeding to terminate parental rights, the court did not err by failing to appoint a guardian. The court did not find the father was incompetent for purposes of the proceeding. *Doe v. Doe* (In re Doe), 138 Idaho 893, 71 P.3d 1040 (2003).

**Cited in:** *In re Andersen*, 99 Idaho 805, 589 P.2d 957 (1978).

**16-2008. Investigation prior to disposition.** — a. If a petition for adoption is not filed in conjunction with a petition for termination, or the petition for termination was not filed by a children's adoption agency licensed by the state of Idaho upon the filing of a petition for termination, the court shall direct the department of health and welfare, bureau of child support enforcement [bureau of child support services] to submit a written financial analysis report within thirty (30) days from date of notification, detailing the amount of any unreimbursed public assistance moneys paid by the state of Idaho on behalf of the child. The financial analysis shall include recommendations regarding repayment of unreimbursed public assistance and provisions for future support for the child, and the reasons therefor.

b. Upon the filing of a petition, the court may direct, in all cases where written consent to termination has not been given as provided in this act, that an investigation be made by the department of health and welfare, division of family and children's services [division of family and community services], or a licensed children's adoption agency, and that a report in

writing of such study be submitted to the court prior to the hearing, except that where the department of health and welfare or a licensed children's adoption agency is a petitioner, either in its own right or on behalf of a parent, a report in writing of the investigation made by such agency shall accompany the petition. The department of health and welfare or the licensed children's adoption agency shall have thirty (30) days from notification by the court during which it shall complete and submit its investigation unless an extension of time is granted by the court upon application by the agency. The court may order additional investigation as it deems necessary. The social study shall include the circumstances of the petition, the investigation, the present condition of the child and parents, proposed plans for the child, and such other facts as may be pertinent to the parent and child relationship, and the report submitted shall include a recommendation and the reasons therefor as to whether or not the parent and child relationship should be terminated. If the parent has a disability as defined in this chapter, the parent shall have the right, as a part of the social study, to provide information regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child. The person performing the social investigation shall advise the parent of such right and shall consider all such information in any findings or recommendations. The social study shall be conducted by, or with the assistance of, an individual with expertise in the use of such equipment and services. Nothing in this section shall be construed to create any new or additional obligations on state or local governments to purchase or provide adaptive equipment or supportive services for parents with disabilities. Where the parent is a minor, if the report does not include a statement of contact with the parents of said minor, the reasons therefor shall be set forth. The purpose of the investigation is to aid the court in making disposition of the petition and shall be considered by the court prior thereto.

c. No social study or investigation as provided for in subsection b. of this section shall be directed by the court with respect to the putative father who has failed to timely commence proceedings to establish paternity under section 7-1111, Idaho Code, and by filing with the vital statistics unit of the department of health and welfare, notice of his commencement of proceedings to establish his paternity of the child, unless such putative father is one of those persons specifically set forth in section 16-1505(1), Idaho Code. [1963, ch. 145, § 8, p. 420; am. 1985, ch. 55, § 1, p. 108; am. 1987, ch. 207, § 3, p. 436; am. 1992, ch. 341, § 3, p. 1031; am. 2000, ch. 171, § 11, p. 422; am. 2002, ch. 233, § 12, p. 666.]

#### STATUTORY NOTES

**Cross References.** — Vital statistics unit, § 39-342.

**Compiler's Notes.** — The words "this act" refer to S.L. 1963, ch. 145, compiled as §§ 16-2001 — 16-2015.

The bracketed insertions in a. and b. were added by the compiler to update the agency names.



## JUDICIAL DECISIONS

## ANALYSIS

Factors for court's consideration.  
Report.

**Factors for Court's Consideration.**

Findings of fact regarding children's progress in adapting to foster homes and actions of father since children were taken into custody and his contacts with them and his attempts to influence them were proper factors for consideration of court in making decision as to termination of parent-child relationship with respect to the mother. *State ex rel. Child v. Clouse*, 93 Idaho 893, 477 P.2d 834 (1970).

partment to prepare a report as provided for in this section, it is not reversible error for failure to submit such a report where all the information required by the report was before the court through the pleadings and interrogatories. *State ex rel. Child v. Clouse*, 93 Idaho 893, 477 P.2d 834 (1970).

**Cited in:** *Castro v. State Dep't of Health & Welfare*, 102 Idaho 218, 628 P.2d 1052 (1981); *Bush v. Phillips*, 113 Idaho 873, 749 P.2d 492 (1988).

**Report.**

While the better procedure is for the de-

## RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, § 73 et seq.

**16-2009. Hearing.** — Cases under this act shall be heard by the court without a jury. The hearing may be conducted in an informal manner and may be adjourned from time to time. Stenographic notes or mechanical recording of the hearing shall be required. The general public shall be excluded and only such persons admitted whose presence is requested by any person entitled to notice under the provisions of section 16-2007, Idaho Code, or as the judge shall find to have a direct interest in the case or in the work of the court; provided that persons so admitted shall not disclose any information secured at the hearing which would identify an individual child or parent. The court may require the presence of witnesses deemed necessary to the disposition of the petition, except that a parent who has executed a waiver pursuant to section 16-2007, Idaho Code, shall not be required to appear at the hearing.

The parent or guardian ad litem shall be notified as soon as practicable after the filing of a petition and prior to the start of a hearing of his right to have counsel, and if counsel is requested and the parent or guardian is financially unable to employ counsel, counsel shall be provided. The prosecuting attorneys of the several counties shall represent the department at all stages of the hearing.

The court's finding with respect to grounds for termination shall be based upon clear and convincing evidence under rules applicable to the trial of civil causes, provided that relevant and material information of any nature, including that contained in reports, studies or examinations, may be admitted and relied upon to the extent of its probative value. When information contained in a report, study or examination is admitted in evidence, the person making such report, study or examination shall be subject to both direct and cross-examination. [1963, ch. 145, § 9, p. 420; am.

1983, ch. 128, § 1, p. 324; am. 1987, ch. 207, § 4, p. 436; am. 1993, ch. 88, § 1, p. 216.]

## STATUTORY NOTES

**Compiler's Notes.** — For words “this act” see Compiler's Notes, § 16-2008.

Section 5 of S.L. 1987, ch. 207 read: “SEVERABILITY. The provisions of this act are hereby declared to be severable and if any

provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act.”

## JUDICIAL DECISIONS

### ANALYSIS

Appellate review.  
Attorney fees.  
Due process satisfied.  
Due process requirements.  
Effectiveness of counsel.  
Examination of children.  
Involuntary termination.  
—Parent's right to counsel.  
Standard of proof.  
Sufficiency of evidence.  
—Clear and convincing.  
When parent's presence not required.

### Appellate Review.

Whether neglect has occurred is a question of fact, to be determined in the first instance by the trial judge upon a constitutionally mandated standard of clear and convincing evidence; when neglect has been found upon this standard, the judge's finding — like any finding of fact — is reviewable upon the appellate standard of substantial evidence. *State, Dep't of Health & Welfare v. Cheatwood*, 108 Idaho 218, 697 P.2d 1232 (Ct. App. 1985).

Where, in an action to terminate parental rights, the burden of proving neglect by clear and convincing evidence has been noted explicitly and applied by the trial judge, the appellate court will not disturb the trial court's findings unless they are unsupported by substantial evidence. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

Where the trial court finds that abandonment is established by clear and convincing evidence, those findings will not be overturned on appeal unless they are clearly erroneous; clear error will not be deemed to exist where the findings are supported by substantial and competent, albeit conflicting, evidence. *Crum v. State, Dep't of Health & Welfare*, 111 Idaho 407, 725 P.2d 112 (1986).

A parent-child relationship may be terminated by the court when it finds that the parent has neglected or abused the child, or that termination is found to be in the best interests of the parent and child; on appeal the supreme court will not disturb those find-

ings, if they are supported by substantial and competent evidence. *Dayley v. State, Dep't of Health & Welfare*, 112 Idaho 522, 733 P.2d 743 (1987).

### Attorney Fees.

Where attorney employed by legal aid services represented indigent mother in parent-child termination proceeding by appointment of the court under this section, he was entitled to attorney fees based on an hourly rate. *Ellison v. Maynard*, 101 Idaho 760, 620 P.2d 794 (1980).

### Due Process Satisfied.

In parental right termination hearing where father having been convicted of two murders was incarcerated in federal penitentiary in Texas, father requested that he be transported at state expense to the termination hearing so he could be present and testify in person was not deprived of procedural due process where magistrate in denying his request initially protected the father's rights by appointing competent counsel to represent him and later applied the principles of *Matthew v. Eldridge*, 424 U.S. 319, by considering the extent of the private and public interests affected, the risks and burdens involved, and the value of substitute safeguards in deciding whether to have the father present or whether to allow him to testify by way of deposition. *State, Dep't of Health & Welfare v. Doe*, 130 Idaho 47, 936 P.2d 690 (Ct. App. 1997).



### **Due Process Requirements.**

In determining whether the procedure followed in a parental rights termination proceeding satisfied the constitutional requirements of due process the criteria of *Matthews v. Eldridge*, 424 U.S. 319, consideration of three factors is mandated: 1. the private interest that will be affected by the official action; 2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3. the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *State, Dep't of Health & Welfare v. Doe*, 130 Idaho 47, 936 P.2d 690 (Ct. App. 1997).

### **Effectiveness of Counsel.**

Counsel's decision not to call the mother to the stand and his option to argue rehabilitation rather than lack of evidence to support a finding of abuse were tactical decisions, and strategic and tactical decisions of counsel do not sustain a charge of ineffective counsel. *State, Dep't of Health & Welfare v. Mahoney-Williams*, 101 Idaho 280, 611 P.2d 1065 (1980).

### **Examination of Children.**

In a proceeding to terminate a parent-child relationship, the fact that the trial judge examined the children involved in private with no record having been made of the examination was held to be harmless error since it is within the discretion of the trial judge to interview children outside the presence of parents in such an action. *State ex rel. Child v. Clouse*, 93 Idaho 893, 477 P.2d 834 (1970).

### **Involuntary Termination.**

#### **—Parent's Right to Counsel.**

As soon as the court perceived that a parental termination proceeding, originally scheduled as voluntary termination, would be involuntary, the court was obligated under this section to inform the mother of her right to be represented by counsel. *State v. Doe*, 123 Idaho 562, 850 P.2d 211 (Ct. App. 1993).

### **Standard of Proof.**

The standard of proof required for termination of parental rights, "clear and convincing" evidence, is not affected by the private or public nature of the party seeking termination. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

### **Sufficiency of Evidence.**

In a proceeding to terminate a parent-child relationship, evidence showing that the father had been unable to hold steady employment because of chronic alcoholism which resulted in numerous convictions for public

intoxication as well as burglary was held to be sufficient to support a judgment of termination under this section when considered in conjunction with a finding that the mother of the children was incapable of providing her children with moral guidance, training, and support. *State ex rel. Child v. Clouse*, 93 Idaho 893, 477 P.2d 834 (1970).

Where the children's behavior and school work generally improved while they were living away from the mother, the children themselves told the judge that they felt insecure at their mother's home and did not want to live there, and the caseworker stated that the children needed a permanent, stable living arrangement that the mother had been unable to provide, the magistrate's finding that termination of the mother's parental rights was in the children's best interests was supported by substantial evidence and had to be sustained on appeal. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

Where the mother failed to provide the parental care necessary for the children's health, morals and well-being, the magistrate's finding that the mother had neglected her daughters was supported by substantial evidence and would not be disturbed. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

Termination of a slightly mentally retarded mother's parental rights to her two children would be upheld in view of evidence that the children were abused, neglected, and abandoned, that because of the mother's inability or lack of desire, there appeared to be little or no chance of improvement in conditions for the children, and that the mother, although she expressed love for her children, was barely able to provide basic care for herself, let alone her children. *Brown v. State*, 112 Idaho 901, 736 P.2d 1355 (Ct. App. 1987).

#### **—Clear and Convincing.**

This section, since the 1983 amendment, requires that at least one of the grounds for terminating parental rights be proved by clear and convincing evidence; even though this requirement was not a part of the statute until 1983, parental rights could not be terminated on a lesser standard because of due process requirements of the United States Constitution. *Thompson v. Thompson*, 110 Idaho 93, 714 P.2d 62 (Ct. App. 1986).

Where the father was in prison when his child was born and had never seen his child or provided financial support for him, but after learning of the child's birth, he sent the child several Christmas gifts, tried to speak with the child's mother and maternal grandmother, wrote to the grandmother without receiving a response, signed documents authorizing medical treatment for the child, contacted the caseworker a number of times,



and wrote a letter to the magistrate court indicating that he did not want his parental rights terminated, and the mother's parental rights were already terminated, the father's failure to complete the "rider" program after the child was born and get out of prison early was not substantial competent evidence that supported a finding by clear and convincing evidence of abandonment; the father's efforts to maintain a relationship with the child had to be judged in terms of the reality of his imprisonment and not trivialized. *Doe v. State*, 137 Idaho 758, 53 P.3d 341 (2002).

**When Parent's Presence not Required.**

In action to terminate the parent-child relationship between father and child where father was incarcerated in federal penitentiary in Texas after conviction of two murders in Mexico, father was not deprived of procedural due process where magistrate denied

father's request to be present and went forward with the termination hearing while affording the father the opportunity to give his testimony by deposition, since magistrate took steps to protect the father's rights initially by appointing counsel to represent him pursuant to this section and later applied the principles enunciated in *Matthews v. Eldridge*, 424 U.S. 319, in determining whether to grant the father's request. *State, Dep't of Health & Welfare v. Doe*, 130 Idaho 47, 936 P.2d 690 (Ct. App. 1997).

**Cited in:** *State, Dep't of Health & Welfare v. Holt*, 102 Idaho 44, 625 P.2d 398 (1981); *Bush v. Phillips*, 113 Idaho 873, 749 P.2d 492 (1988); *Tanner v. State Dep't of Health & Welfare*, 120 Idaho 606, 818 P.2d 310 (1991); *State v. Doe*, 133 Idaho 826, 992 P.2d 1226 (Ct. App. 1999); *State v. Doe (In re Doe)*, 145 Idaho 662, 182 P.3d 1196 (2008).

**RESEARCH REFERENCES**

<b>C.J.S.</b> — 43 C.J.S., Infants, § 58 et seq.	termination of parental rights. 92 A.L.R.5th
<b>A.L.R.</b> — Right of indigent parent to appointed counsel in proceeding for involuntary	379.

**16-2010. Decree.** — (1) Every order of the court terminating the parent and child relationship or transferring legal custody or guardianship of the person of the child shall be in writing and shall recite the findings upon which such order is based, including findings pertaining to the court's jurisdiction.

(2)(a) If the court finds sufficient grounds exist for the termination of the parent and child relationship, it shall so decree and:

- (i) Appoint an individual as guardian of the child's person, or
- (ii) Appoint an individual as guardian of the child's person and vest legal custody in another individual or in an authorized agency, or
- (iii) Appoint an authorized agency as guardian of the child's person and vest legal custody in such agency.

(b) The court shall also make an order fixing responsibility for the child's support. The parent and child relationship may be terminated with respect to one (1) parent without affecting the relationship between the child and the other parent.

(3) Where the court does not order termination of the parent and child relationship, it shall dismiss the petition; provided however, that where the court finds that the best interest of the child requires substitution or supplementation of parental care and supervision, it shall make an order placing the child under protective supervision, or vesting temporary legal custody in an authorized agency, fixing responsibility for temporary child support, and designating the period of time during which the order shall remain in effect.

(4) If termination of parental rights is granted and the child is placed in the guardianship or legal custody of the department of health and welfare, the court, upon petition, shall conduct a hearing as to the future status of

the child within twelve (12) months of the order of termination of parental rights, and every twelve (12) months subsequently until the child is adopted or is in a placement sanctioned by the court. [1963, ch. 145, § 10, p. 420; am. 1989, ch. 216, § 1, p. 524; am. 1989, ch. 218, § 5, p. 527; am. 1992, ch. 341, § 4, p. 1031; am. 1998, ch. 257, § 6, p. 850; am. 2000, ch. 171, § 12, p. 422; am. 2005, ch. 391, § 51, p. 1263.]

### STATUTORY NOTES

**Amendments.** — This section was amended by two 1989 acts — chapter 216, § 1, and chapter 218, § 5 — which appear to be identical and have been compiled together.

Both the amendments by ch. 216 and by ch. 218 inserted “(1)” in the second sentence of the last paragraph of subdivision a., and added subdivision c.

### JUDICIAL DECISIONS

#### Authority of Court.

While the statute grants the court the authority to continue to order hearings until children are placed in a permanent living situation that is approved by the court, it does

not give the court the authority to select the adoptive parents. *Idaho Dep’t of Health & Welfare v. Hays*, 137 Idaho 233, 46 P.3d 529 (2002).

### RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, § 71.

**16-2011. Effect of decree.** — An order terminating the parent and child relationship shall divest the parent and the child of all legal rights, privileges, duties, and obligations, including rights of inheritance, with respect to each other. [1963, ch. 145, § 11, p. 420.]

### JUDICIAL DECISIONS

#### ANALYSIS

Criminal case.  
Parties bound.

#### Criminal Case.

While it was true that defendant’s legal rights, privileges and obligations toward his child ceased if his parental rights were terminated, the district court’s directive to pay restitution in the form of child support was a condition of probation in a criminal case; thus, to determine its validity, the appellate court need only consider whether the order was reasonably related to the purpose of probation and rehabilitation. *State v. Jeffs*, 140

Idaho 466, 95 P.3d 84 (Ct. App. 2004).

#### Parties Bound.

Where natural mother’s habeas corpus petition related to the merits of a custody dispute which she had a full and fair opportunity to litigate and appeal in the state court system, she was bound by the state judgment despite her reframing the dispute as a petition for habeas corpus. *Tree Top v. Smith*, 577 F.2d 519 (9th Cir. 1978).

### RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, § 20 et seq.

**16-2012. Court costs.** — All court costs of giving notice and advertising shall be paid by the petitioners, except when the petitioner is an authorized

agency. The court, however, may suspend such costs where payment would work a hardship on the petitioner or would be otherwise inappropriate. [1963, ch. 145, § 12, p. 420.]

**16-2013. Records.** — The files and records of the court in any proceedings had under this act shall be kept in a separate locked file and shall be withheld from public inspection, but shall be open to inspection on special order of the court by persons having a legitimate interest in the case and their attorneys, and by an authorized agency to which legal custody of the child has been transferred. As used in this section, the words “files and records” include the court docket and entries therein, the petitions and other papers filed in any case, transcripts of testimony taken by the court, and findings, orders, and decrees, and other writings filed in proceedings before the court, other than social records. Social records shall be withheld from public inspection except that information from such records may be furnished to persons and agencies having a legitimate interest in the protection, welfare and treatment of the child, in such manner as the court determines. As used in this section, the words “social records” include the social service records of the court, the investigation and reports referred to in Section 16-2008[, Idaho Code], and related papers and correspondence, including medical, psychological and psychiatric studies and reports, either in the possession of the court or authorized agency.

No person shall be entitled to make copies of such files and records or social records or parts thereof unless the court so orders. It shall be unlawful, except for purposes for which files and records or social records or parts thereof or information therefrom have been released pursuant to this section, or except for purposes permitted by special order of the court, for any person to disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any information concerning any person before the court directly or indirectly derived from the files and records or communications of the court, or social records, or acquired in the course of the performance of official duties. Any person who shall disclose information in violation of the provisions of this section shall be guilty of a misdemeanor. [1963, ch. 145, § 13, p. 420.]

STATUTORY NOTES

<b>Cross References.</b> — Penalty for misdemeanor where none prescribed, § 18-317.	added by the compiler to standardize the statutory citation style.
<b>Compiler’s Notes.</b> — The bracketed insertion near the end of the first paragraph was	For words “this act” see Compiler’s Notes, § 16-2008.

RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, § 95.

**16-2014. Appeals.** — An appeal may be taken to the district court from an order or decree of the court granting or refusing to grant a termination, in the manner and form as appeals are taken in other civil proceedings from the magistrates division of the district court to district courts, provided,



however, pendency of an appeal or application therefor shall not suspend the order of the court relative to termination of the parent-child relationship. [1963, ch. 145, § 14, p. 420; am. 1971, ch. 170, § 4, p. 805.]

### STATUTORY NOTES

**Compiler's Notes.** — Section 15 of S.L. 1963, ch. 145 reads: "If any section, sub-section, sub-division, paragraph, sentence, part or provision of this act shall be found to be invalid or ineffective by any court it shall be conclusively presumed that this act would have been passed by the legislature without such invalid or ineffective section, sub-section, sub-division, paragraph, sentence, part

or provision, and this act as a whole shall not be declared invalid by reason of the fact that one or more sections, sub-sections, sub-divisions, paragraphs, sentences, parts or provisions may be so found invalid."

**Effective Dates.** — Section 5 of S.L. 1971, ch. 170 declared an emergency. Approved March 20, 1971.

### JUDICIAL DECISIONS

#### **Jurisdiction.**

Where court had jurisdiction of case under this section, court's statement in its order that matter was heard pursuant to an appeal under this law was sufficient to identify the jurisdiction-granting statute without reciting

jurisdictional findings. *State ex rel. Child v. Clouse*, 93 Idaho 893, 477 P.2d 834 (1970).

**Cited in:** *State, Dep't of Health & Welfare v. Holt*, 102 Idaho 44, 625 P.2d 398 (1981).

### RESEARCH REFERENCES

**C.J.S.** — 43 C.J.S., Infants, § 96 et seq.

**16-2015. Construction.** — This act shall be liberally construed to accomplish the purposes herein set forth. [1963, ch. 145, § 16, p. 420.]

### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see *Compiler's Notes*, § 16-2008.

**Effective Dates.** — Section 17 of S.L. 1963, ch. 145 reads: "This act shall take effect

August 1, 1963. Termination proceedings initiated prior to such date shall not be affected by this act."

## CHAPTER 21

### INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

#### SECTION.

- 16-2101. Legislative findings and policy.
- 16-2102. Execution of compact.
- 16-2103. Compact administrator.
- 16-2104. Supplementary agreements.

#### SECTION.

- 16-2105. Financial arrangements.
- 16-2106. Financial responsibility of parents and guardians of estate.
- 16-2107. Responsibilities of enforcement.

**16-2101. Legislative findings and policy.** — It is hereby found and declared: (1) that the needs of children requiring placement and of adults seeking to receive them cannot be met by restricting child placement services and supervision to the territory of a single state; (2) that the cooperation of this state with other states is necessary to improve services and protection for children in need of placement.

It shall therefore be the policy of this state, in adopting the Interstate Compact on the Placement of Children, to cooperate fully with other states: (1) in furnishing public authorities in a receiving state with notice of the intention to place a child in the receiving state; (2) in placing a child in a receiving state only after receiving notification from that receiving state as to suitability of the placement; and (3) in conforming with the applicable laws of the receiving state governing the placement of children therein.

Nothing in this act shall be interpreted as limiting the jurisdiction of the courts under chapter [chapters] 16 and 18, title 16, Idaho Code. [I.C., § 16-2101, as added by 1976, ch. 189, § 1, p. 681.]

STATUTORY NOTES

**Compiler’s Notes.** — The words “this act”

The bracketed word “chapters” was inserted by the compiler to add clarity.

refer to S.L. 1976, ch. 189, compiled as §§ 16-2101 — 16-2107.

**16-2102. Execution of compact.** — The governor is hereby authorized and directed to execute a compact on behalf of this state with any other state or states legally joining therein in the form substantially as follows:

ARTICLE I. PURPOSE AND POLICY

It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

- (a) Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care.
- (b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.
- (c) The proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.
- (d) Appropriate jurisdictional arrangements for the care of children will be promoted.

ARTICLE II. DEFINITIONS

As used in this compact:

- (a) “Child” means a person who, by reason of minority, is legally subject to parental, guardianship or similar control.
- (b) “Sending agency” means a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought, any child to another party state.
- (c) “Receiving state” means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private

persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons.

(d) "Placement" means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility.

### ARTICLE III. CONDITIONS FOR PLACEMENT

(a) No sending agency shall send, bring, or cause to be sent or brought into any other party state, any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

(b) Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

(1) The name, date and place of birth of the child.

(2) The identity and address or addresses of the parents or legal guardian.

(3) The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring, or place the child.

(4) A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

(c) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to paragraph (b) of this article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

(d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

### ARTICLE IV. PENALTY FOR ILLEGAL PLACEMENT

The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any such punishment or penalty, any such violation shall



constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place, or care for children.

## ARTICLE V. RETENTION OF JURISDICTION

(a) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or the child's transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by a receiving state sufficient to deal with an act of delinquency or crime committed herein.

(b) When the sending agency is a public agency it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of such case by the latter as agent for the sending agency.

(c) Nothing in this compact shall be construed to prevent a private charitable agency authorized to place children in the receiving state from performing services or acting as agent in that state for a private charitable agency of the sending state; nor to prevent the agency in the receiving state from discharging financial responsibility for the support and maintenance of a child who has been placed on behalf of the sending agency without relieving the responsibility set forth in paragraph (a) hereof.

## ARTICLE VI. INSTITUTIONAL CARE OF DELINQUENT CHILDREN

A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this compact but no such placement shall be made unless the child is given a court hearing on notice to the parent or guardian with opportunity to be heard, prior to his being sent to such other party jurisdiction for institutional care and the court finds that:

(1) Equivalent facilities for the child are not available in the sending agency's jurisdiction; and

(2) Institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship.

## ARTICLE VII. COMPACT ADMINISTRATOR

The executive head of each jurisdiction party to this compact shall designate an officer who shall be general coordinator of activities under this compact in his jurisdiction and who, acting jointly with like officers of other party jurisdictions, shall have power to promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.

## ARTICLE VIII. LIMITATIONS

This compact shall not apply to:

(a) The sending or bringing of a child into a receiving state by his parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or nonagency guardian in the receiving state.

(b) Any placement, sending or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between said states which has the force of law.

## ARTICLE IX. ENACTMENT AND WITHDRAWAL

This compact shall be open to joinder by any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico and, with the consent of Congress, the government of Canada or any province thereof. It shall become effective with respect to any such jurisdiction when such jurisdiction has enacted the same into law. Withdrawal from this compact shall be by the enactment of a statute repealing the same, but shall not take effect until two (2) years after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.

## ARTICLE X. CONSTRUCTION AND SEVERABILITY

The provisions of this compact shall be liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state party thereto, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. [I.C., § 16-2102, as added by 1976, ch. 189, § 1, p. 681.]

**16-2103. Compact administrator.** — Pursuant to said compact, the governor is hereby authorized and empowered to designate an officer who shall be the compact administrator and who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms of the compact. Said compact administrator shall serve subject to the pleasure of the governor. The compact administrator is hereby authorized, empowered and directed to cooperate with all depart-

ments, agencies and officers of and in the government of this state and its subdivisions in facilitating the proper administration of the compact or of any supplementary agreement or agreements entered into by this state thereunder. [I.C., § 16-2103, as added by 1976, ch. 189, § 1, p. 681.]

#### STATUTORY NOTES

**Compiler's Notes.** — Regulations implementing the provisions of this compact can be found at <http://icpc.aphsa.org/Home/regulations.asp>.

**16-2104. Supplementary agreements.** — The compact administrator is hereby authorized and empowered to enter into supplementary agreements with appropriate officials of other states pursuant to the compact. In the event that such supplementary agreement shall require or contemplate the use of any institution or facility of this state or require or contemplate the provision of any service of this state, said supplementary agreement shall have no force or effect until approved by the head of the department or agency under whose jurisdiction said institution or facility is operated or whose department or agency will be charged with the rendering of such service. [I.C., § 16-2104, as added by 1976, ch. 189, § 1, p. 681.]

**16-2105. Financial arrangements.** — The compact administrator, subject to the approval of the board of examiners, may make or arrange for any payments necessary to discharge any financial obligations imposed upon this state by the compact or by any supplementary agreement entered into thereunder. [I.C., § 16-2105, as added by 1976, ch. 189, § 1, p. 681.]

#### STATUTORY NOTES

**Cross References.** — Board of examiners, art. IV, § 18, Idaho Const. and § 67-2001 et seq.

**16-2106. Financial responsibility of parents and guardians of estate.** — The compact administrator shall take appropriate action to effect the recovery from relevant parents or guardians of estate, at the option of said administrator, of any and all costs expended by the state, or any of its subdivisions, with respect to Idaho children handled under said compact. [I.C., § 16-2106, as added by 1976, ch. 189, § 1, p. 681.]

**16-2107. Responsibilities of enforcement.** — The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions. [I.C., § 16-2107, as added by 1976, ch. 189, § 1, p. 681.]



## CHAPTERS 22 AND 23

[RESERVED]

## CHAPTER 24

## CHILDREN'S MENTAL HEALTH SERVICES

## SECTION.

- 16-2401. Short title.
- 16-2402. Legislative purposes.
- 16-2403. Definitions.
- 16-2404. Community services and supports and interagency collaboration.
- 16-2404A. Teen early intervention mental health and substance abuse specialist program.
- 16-2405. Charges to parents.
- 16-2406. Access to services.
- 16-2407. Voluntary admission to hospital or residential treatment facility.
- 16-2408. Discharge or petition for one hundred twenty day treatment order.
- 16-2409. Conversion from involuntary to voluntary status.
- 16-2410. Review of voluntary admission.
- 16-2411. Emergency mental health response and evaluation — Temporary detention by a peace officer.
- 16-2412. Emergency treatment upon certification by designated examiner.
- 16-2413. Emergency admission and treatment facility determination.
- 16-2414. Order for emergency evaluation.
- 16-2415. Dispositional authority.
- 16-2416. One hundred twenty day involuntary treatment order.
- 16-2417. Hearing on the one hundred twenty

## SECTION.

- day involuntary treatment order.
- 16-2418. Criteria for one hundred twenty day involuntary treatment order.
- 16-2419. Effect of involuntary treatment orders on parental rights and custody.
- 16-2420. Successive periods of involuntary treatment.
- 16-2421. Waiver of right to be present at hearings.
- 16-2422. Informed consent to medication or other treatment — Persons under voluntary treatment.
- 16-2423. Informed consent to medication or other treatment — Persons subject to involuntary or emergency treatment.
- 16-2424. Provision of treatment.
- 16-2425. Rights of children in treatment facilities.
- 16-2426. Notification of rights.
- 16-2427. Discharge.
- 16-2428. Confidentiality and disclosure of information.
- 16-2429. Right to representation.
- 16-2430. Transportation.
- 16-2431. Cost of involuntary treatment proceedings.
- 16-2432. False statements — Penalties.
- 16-2433. Department rules.
- 16-2434. Construction.

**16-2401. Short title.** — This chapter governing the access to the continuum of services for children with serious emotional disturbance may be cited as the “Children’s Mental Health Services Act.” [I.C., § 16-2401, as added by 1997, ch. 404, § 1, p. 1281.]

## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2402. Legislative purposes.** — (1) It is the policy of the legislature and the state of Idaho that services for children with serious emotional disturbance should be planned and implemented to maximize the support of the family’s ability to provide adequate safety and well-being for the child at home. If the child cannot receive adequate services within the family home to maintain individual safety and well-being, community resources shall be

provided to minimize the need for institutional or other residential placement. The legislature finds that family involvement and participation in the child's treatment planning and implementation is vital to successful intervention for children with serious emotional disturbance.

(2) Services to address mental health needs are one part of a broad array of services which should be available to Idaho's children with special needs. Such services shall maximize the preservation of the family, by coordination and collaboration of services with schools and community. The department of health and welfare, the department of education, the department of juvenile corrections, school districts, counties and any other appropriate entities, shall cooperate and collaborate in planning, developing and providing services, and shall consult with counties and private providers of mental health services.

(3) Services shall be individually planned to meet the unique needs of each child and family. Such planning shall include the parent, guardian or surrogate parent(s) of each child. The continuum of services shall include, but not be limited to, individual and family counseling, crisis intervention services, day treatment, respite care, therapeutic foster homes, family support services, residential treatment and inpatient services. These services shall be available to meet the needs of Idaho's children with serious emotional disturbance or mental illness and their families. Services shall be provided without requiring that parents relinquish custody of the child.

(4) This chapter is intended to achieve, and shall be construed to promote, these legislative purposes:

(a) To empower families of children with serious emotional disturbance to determine their own needs and to make decisions and choices, concerning them;

(b) To give families of children with serious emotional disturbance the support they need, to maintain a stable, nurturing home environment for the children, and to respond to the needs of the entire family, without requiring families to accept services that they do not desire or seek;

(c) To utilize out-of-home placement only after families are provided supportive services and those services are inadequate to provide a reasonable level of safety and well-being for the child and family, or when an emergency exists which requires immediate intervention. Any placement of a child out of home shall follow the principles of least restrictive alternative placement as defined in this chapter and shall be for the shortest period of time necessary to provide for the safety and well-being of the child and family;

(d) To plan, develop, deliver, and evaluate services for children with serious emotional disturbance in an efficient, coordinated and collaborative statewide system, of individualized services;

(e) To provide services in settings that are close to the patterns and norms of society and sensitive to the regional, cultural, and ethnic characteristics of Idaho's families and communities;

(f) To provide services for families as close to their home communities as possible and to promote integration of families into their communities;

- (g) To make use of the capacities of local communities to complement existing public and private community resources, including natural and informal supports provided by family and friends;
- (h) To give priority to planning, developing, implementing, and evaluating children's mental health services to prevent, ameliorate, or reduce the impact of serious emotional disturbance on families;
- (i) To assist all state and local public and private agencies and service providers to provide appropriate, flexible, and cost-effective home and community-based services for families;
- (j) All state agencies providing services to children with serious emotional disturbances prior to the passage of this chapter shall maintain their existing level of services to this population.
- (5) All department and private providers acting under this chapter shall:
  - (a) Identify and coordinate all available resources, both formal and informal, public and private, so that the needs of families can be met and their strengths can be applied;
  - (b) Include participation of families with children with serious emotional disturbance in all phases of planning, developing, implementing, and evaluating the programs that affect them;
  - (c) Be flexible, so that families will have power to decide what services to use, how to use them, and how often to use them;
  - (d) Apply a family centered approach in working with families;
  - (e) Respect a family's method of problem solving and their preferred methods of communication;
  - (f) Be sensitive to families' social, economic, physical and other environments;
  - (g) Disseminate information so that eligible families will know of the availability of services;
  - (h) Provide services in a manner to ensure uninterrupted and consistent availability of services between children's and adult services when the child reaches the age of majority;
  - (i) Refrain from any discrimination on the basis of race, gender, religion, ethnicity, national origin, or disabling condition in the employment of individuals, and in providing services. [I.C., § 16-2402, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Cross References.** — Department of juvenile corrections, § 20-501.  
State department of education, § 33-125.

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2403. Definitions.** — As used in this chapter:

- (1) "Child" means an individual less than eighteen (18) years of age and not emancipated by either marriage or legal proceeding.
- (2) "Consistent with the least restrictive alternative principle" means that services are delivered in the setting which places the fewest restrictions on the personal liberty of the child, and provides the greatest integration with individuals who do not have disabilities, in typical and age appropriate,



school, community and family environments, which is consistent with safe, effective and cost-effective treatment for the child and family.

(3) "Department" means the department of health and welfare.

(4) "Designated examiner" means a psychiatrist, psychologist, psychiatric nurse, or social worker and such other mental health professionals as may be designated in accordance with rules promulgated pursuant to the provisions of chapter 52, title 67, Idaho Code, by the department of health and welfare. Any person designated by the department director will be specially qualified by training and experience in the diagnosis and treatment of mental or mentally related illnesses or conditions.

(5) "Director" means the director of the state department of health and welfare.

(6) "Emergency" means a situation in which the child's condition, as evidenced by recent behavior, poses a significant threat to the health or safety of the child, his family or others, or poses a serious risk of substantial deterioration in the child's condition which cannot be eliminated by the use of supportive services or intervention by the child's parents, or mental health professionals, and treatment in the community while the child remains in his family home.

(7) "Informed consent to treatment" means a knowing and voluntary decision to undergo a specific course of treatment, evidenced in writing, and made by an emancipated child, or a child's parent, or guardian, who has the capacity to make an informed decision, after the staff of the facility or other provider of treatment have explained the nature and effects of the proposed treatment.

(8) "Involuntary treatment" means treatment, services and placement of children provided without consent of the parent of a child, under the authority of a court order obtained pursuant to this chapter, as directed by an order of disposition issued by a designated employee of the department of health and welfare under section 16-2415, Idaho Code.

(9) "Lacks capacity to make an informed decision concerning treatment" means that the parent is unable to understand the nature and effects of hospitalization or treatment, or is unable to engage in a rational decision-making process regarding such hospitalization or treatment, as evidenced by an inability to weigh the risks and benefits, despite conscientious efforts to explain them in terms that the parent can understand.

(10) "Likely to cause harm to himself or to suffer substantial mental or physical deterioration" means that, as evidenced by recent behavior, the child:

(a) Is likely in the near future to inflict substantial physical injury upon himself; or

(b) Is likely to suffer significant deprivation of basic needs such as food, clothing, shelter, health or safety; or

(c) Will suffer a substantial increase or persistence of symptoms of mental illness or serious emotional disturbance which is likely to result in an inability to function in the community without risk to his safety or well-being or the safety or well-being of others, and which cannot be treated adequately with available home and community-based outpatient services.

(11) "Likely to cause harm to others" means that, as evidenced by recent behavior causing, attempting, or threatening such harm with the apparent ability to complete the act, a child is likely to cause physical injury or physical abuse to another person.

(12) "Protection and advocacy system" means the agency designated by the governor as the state protection and advocacy system pursuant to 42 U.S.C. 6042 and 42 U.S.C. 10801 et seq.

(13) "Serious emotional disturbance" means an emotional or behavioral disorder, or a neuropsychiatric condition which results in a serious disability, and which requires sustained treatment interventions, and causes the child's functioning to be impaired in thought, perception, affect or behavior. A disorder shall be considered to "result in a serious disability" if it causes substantial impairment of functioning in family, school or community. A substance abuse disorder does not, by itself, constitute a serious emotional disturbance, although it may coexist with serious emotional disturbance.

(14) "Special therapy" means any treatment modality used to treat children with serious emotional disturbances which is subject to restrictions or special conditions imposed by the department of health and welfare rules.

(15) "Surrogate parent" means any person appointed to act in the place of the parent of a child for purposes of developing an individual education program under the authority of the individuals with disabilities education act, 20 U.S.C. 1400 et seq., as amended.

(16) "Teens at risk" means individuals attending Idaho secondary public schools who have been identified as expressing or exhibiting indications of depression, suicidal inclination, emotional trauma, substance abuse or other behaviors or symptoms that indicate the existence of, or that may lead to, the development of mental illness or substance abuse.

(17) "Treatment facility" means a facility or program meeting applicable licensing standards, that has been approved for the provisions of services under this chapter by the department of health and welfare. [I.C., § 16-2403, as added by 1997, ch. 404, § 1, p. 1281; am. 2003, ch. 249, § 1, p. 641; am. 2007, ch. 309, § 1, p. 870; am. 2008, ch. 219, § 1, p. 678.]

#### STATUTORY NOTES

**Amendments.** — The 2007 amendment, by ch. 309, added subsection (16) and redesignated former subsection (16) as (17).

The 2008 amendment, by ch. 219, in subsection (16), substituted "individuals" for "children" and "Idaho secondary public schools" for "Idaho public schools grades seven (7) through twelve (12)."

**Federal References.** — 42 USCS § 6042, referred to in subsection (12), was repealed by Act Oct. 30, 2000, P.L. 106-402. See now 42 USCS § 15043.

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2404. Community services and supports and interagency collaboration.** — (1) Lead agency. The department of health and welfare shall be the lead agency in establishing and coordinating community supports, services and treatment for children with serious emotional disturbance and their families, utilizing public and private resources available in the child's community. Such resources shall be utilized to provide services consistent



with the least restrictive alternative principle, to assist the child's family to care for the child in his home and community whenever possible. The state department of education shall be the lead agency for educational services.

(2) Planning. The department of health and welfare, the state department of education, the department of juvenile corrections, counties, and local school districts shall collaborate and cooperate in planning and developing comprehensive mental health services and individual treatment and service plans for children with serious emotional disturbance making the best use of public and private resources to provide or obtain needed services and treatment.

(3) Teens at risk. The department of health and welfare, the state department of education, the department of juvenile corrections, counties, courts and local school districts may collaborate and cooperate in planning and developing mental health counseling, substance abuse treatment and recovery support services and individual service plans for teens at risk.

(4) Contracting. The department of health and welfare shall also have the authority to enter into contracts with school districts to provide teen early intervention specialists as provided for in section 16-2404A, Idaho Code. [I.C., § 16-2404, as added by 1997, ch. 404, § 1, p. 1281; am. 2007, ch. 309, § 2, p. 870.]

STATUTORY NOTES

**Cross References.** — Department of juvenile corrections, § 20-501.  
State department of education, § 33-125.  
**Amendments.** — The 2007 amendment,

by ch. 309, added subsections (3) and (4).  
**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2404A. Teen early intervention mental health and substance abuse specialist program.** — (1) The department of health and welfare shall be authorized to contract for teen early intervention specialists to work with teens at risk and their families in school districts.

(2) The teen early intervention specialist shall be a certified counselor or a social worker with a clinical background in mental health or substance abuse as prescribed by the department of health and welfare by rule.

(3) The salary paid to the teen early intervention specialist shall be equivalent to the salary paid to comparably trained and experienced individuals employed by the school district in the region in which the community resource is employed.

(4) Teen early intervention specialists shall work with individual teens at risk to offer group counseling, recovery support, suicide prevention and other mental health and substance abuse counseling services to teens as needed, regardless of mental health diagnosis.

(5) By permission of school administrators, as prescribed in rule, teens at risk not currently enrolled in a public school may, if assigned by a judge, participate in group or individual teen early intervention specialist counseling sessions or services for teens at risk as appropriate.

(6) School districts seeking to have one (1) or more teen early intervention specialists placed within its district may apply to the department of health and welfare for such placement. The department of health and welfare shall



establish by rule a simple application process and criteria for placement of teen early intervention specialists in districts. The number of teen early intervention specialists placed in school districts in any given year shall be limited by the funds appropriated to the teen early intervention specialist program in that fiscal year. In evaluating applications for the three (3) year pilot project, the department of health and welfare shall give special consideration to rural districts and shall consider:

- (a) The demonstrated need for mental health and substance abuse counseling and treatment for teens at risk in the school district;
- (b) The resources and cooperation which the school district has proposed to contribute to the support of the teen early intervention specialist program for teens at risk; and
- (c) The funding appropriated to the teen early intervention specialist program for teens at risk.

(7) Through an initial three (3) year period beginning at the start of the 2008 school year, the department of health and welfare shall work with local school districts where teen early intervention specialists have been placed to gather data on the effectiveness of this program. This data may be gathered and tracked through cooperative projects with Idaho colleges and universities and may include, but not be limited to:

- (a) Impacts on the number and nature of teen arrests;
- (b) Reductions in the number of teen suicides and suicide attempts;
- (c) Changes in patterns of teen incarceration or involvement with Idaho's juvenile justice system;
- (d) Impacts on local caseloads of practitioners in the department of health and welfare;
- (e) Where applicable, impacts to juvenile mental health or drug courts;
- (f) Changes in academic achievement by teens at risk and by those participating in the teen early intervention specialist program; and
- (g) Changes in the number and nature of student disciplinary actions in schools where teen early intervention specialists have been placed. [I.C., § 16-2404A, as added by 2007, ch. 309, § 3, p. 870.]

**16-2405. Charges to parents.** — Parents may be charged for services provided to their children by the department according to the sliding fee scale authorized by section 16-2433, Idaho Code, provided that all services which are part of the child's free appropriate public education as defined in the individuals with disabilities education act, 20 U.S.C. 1400 et seq., as amended, shall be provided to the child at no cost to the parents. [I.C., § 16-2405, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2406. Access to services.** — Access to services for children with serious emotional disturbance and their families shall be voluntary when-

ever informed consent can be obtained. Involuntary treatment or commitment to the department's custody shall not be required as a condition for obtaining, providing, or paying for treatment by the department. The department's assistance with paying for a child's treatment and other services under this chapter shall be based upon the rules adopted by the department and by the sliding fee scale developed under section 16-2433, Idaho Code. Department payments to service providers are only made pursuant to a written agreement between the department and the service provider. The agreement must reflect cost-effective services for the child.

(1) The family and the department may enter into a services agreement if:

(a) The child meets the department's eligibility criteria for treatment or services; and

(b) The child and his parents request mental health services from the department; or

(c) The family requests full or partial payment for services by the department (other than payment through medical assistance, title XIX of the social security act, as amended); or

(d) The youth is involuntarily placed by the department under this chapter.

(2) For purposes of this chapter, a services agreement is a written agreement, binding on the parties, which specifies at a minimum:

(a) The legal status of the child; and

(b) The rights and obligations of the parents or guardians, the child and the department while the child is in the out-of-home placement.

(3) When a child is placed out of his home pursuant to a services agreement or a one hundred twenty (120) day involuntary treatment order by the court, the department shall have the responsibility for the child's placement and care. The financial obligation of the family will be determined after consideration of all available payment and funding sources including title XIX of the social security act, as amended, all available third party sources, and parent resources according to any order for child support under chapter 10, title 32, Idaho Code. Services shall not be conditioned on transfer of custody or parental rights. [I.C., § 16-2406, as added by 1997, ch. 404, § 1, p. 1281; am. 2005, ch. 307, § 1, p. 956.]

#### STATUTORY NOTES

**Federal References.** — Title XIX of the Social Security Act referred to in subsections (1)(c) and (3) is compiled as 42 U.S.C., § 1396 et seq.

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2407. Voluntary admission to hospital or residential treatment facility.** — When the department provides services under this chapter, such services shall be provided on a voluntary basis whenever informed consent can be obtained, and the department shall ensure that services made available to children subject to involuntary treatment orders

are also available on a comparable basis to children seeking services on a voluntary basis.

(1) Admission of children. A treatment facility may admit a child after examining the child and interviewing the family, if a clinician with authority to admit patients to the facility determines that the child is seriously emotionally disturbed and is in need of hospitalization or residential services and, the child's parent, custodian or guardian give such consent to treatment. Prior to such admission, the child and his parent, custodian or guardian shall be advised orally and given a written statement of his rights under this chapter as provided in section 16-2426, Idaho Code, provided that, if the condition of the child is such that notice and advice of his rights would be ineffective, and this determination is recorded in the child's record, such advice to the child may be deferred until the child's mental and emotional condition permits, but for no more than forty-eight (48) hours. Each child and parent shall be asked to sign an acknowledgment that they have been so advised, and this acknowledgment shall be kept in the child's record.

(2) A child shall not be voluntarily admitted to a facility operated by the department unless evaluated and referred by a person on the staff of the regional family and children's services program.

(3) When a child is in a voluntary, out-of-home placement which is funded in whole or in part by state or federal funds, the department may have the propriety of the placement reviewed by the district court of the county in which the child is placed or the county of the child's residence every one hundred eighty (180) days after placement or as required by statutes which govern federal funding for children who are placed out of their homes. [I.C., § 16-2407, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided the act should take effect on and after July 1, 1998.

**16-2408. Discharge or petition for one hundred twenty day treatment order.** — Any child who is voluntarily admitted to a treatment facility upon the consent of his parents or guardian shall be discharged within three (3) business days of a written request for discharge by the consenting person unless such request is withdrawn in writing or there is other legal authority to hold the child at the facility. [I.C., § 16-2408, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2409. Conversion from involuntary to voluntary status.** — Upon approval by the court, a child who is subject to involuntary treatment



under this chapter may at any time convert to a voluntary status if informed consent to treatment can be obtained from his parent or guardian. The court shall approve conversion from involuntary to voluntary status if the court finds that:

- (1)(a) The child is not likely to cause harm to himself or suffer substantial mental or physical deterioration; and
- (b) The child is not likely to cause harm to others; or
- (2) The conversion from involuntary to voluntary status is in the best interests of the child and consistent with the requirements of public safety. [I.C., § 16-2409, as added by 1997, ch. 404, § 1, p. 1281; am. 2005, ch. 307, § 2, p. 956.]

STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2410. Review of voluntary admission.** — A child admitted on the consent of his parents, shall have his admission reviewed at the end of a thirty (30) day period from the initial date of admission to the program. The review shall be accomplished by having the child's treating clinician review the child's treatment and determine whether continued out-of-home treatment at the facility is still necessary and consistent with the least restrictive alternative principle. If the clinician decides that it is, he or she shall record the findings on a form to be filed in the child's record. The facility shall notify the child and his parents at least seven (7) days prior to the thirty (30) day review and give them an opportunity to comment on the need, if any, for continued inpatient or residential treatment. The facility shall ensure that the child and his parents are aware of the right to request discharge as set forth above. If the facility staff determines that the parent of the child understands these rights and the parent of the child desires to continue treatment, then the facility staff shall so certify on a form designated by the department. These forms shall be kept in the child's patient record, and sent to the child's parent, guardian or custodian. This procedure shall take place every thirty (30) days from the date of the last admission. [I.C., § 16-2410, as added by 1997, ch. 404, § 1, p. 1281.]

STATUTORY NOTES

**Cross References.** — Discharge from voluntary admission, § 16-2408. ch. 404 provided that the act should take effect on and after July 1, 1998.

**Effective Dates.** — Section 2 of S.L. 1997,

**16-2411. Emergency mental health response and evaluation — Temporary detention by a peace officer.** — (1) A peace officer may take a child into protective custody and immediately transport the child to a treatment facility for emergency mental health evaluation in the absence of a court order if and only if the officer determines that an emergency situation exists as defined in this chapter, and the officer has probable cause

to believe, based on personal observation and investigation, representation of the child's parents or the recommendation of a mental health professional, that the child is suffering from serious emotional disturbance as a result of which he is likely to cause harm to himself or others or is manifestly unable to preserve his health or safety with the supports and assistance available to him and that immediate detention and treatment is necessary to prevent harm to the child or others.

(2) The officer shall immediately transport any child taken into protective custody under this section, to a treatment facility or mental health program, such as a regional mental health center, a mobile crisis intervention program, or a therapeutic foster care facility, provided such center's program or facility has been approved by the regional office of the department for that purpose. The department shall make a list of approved facilities available to law enforcement agencies.

(3) Upon taking the child into protective custody, the officer shall take reasonable precautions to safeguard and preserve the personal property of the person unless a parent or guardian or responsible relative is able to do so. Upon presenting a child to a treatment facility the officer shall inform the staff in writing of the facts that caused him to detain the person, and shall specifically state whether the person is otherwise subject to being held for juvenile or criminal offenses.

(4) If the child who is being detained is not released to the child's parent, guardian or custodian, the law enforcement agency shall contact the child's parent, guardian or custodian as soon as possible, and in no case later than twenty-four (24) hours, and shall notify the child's parent, guardian or custodian of his status, location and the reasons for the detention of the child. If the parents cannot be located or contacted, efforts to comply with this section and the reasons for failure to make contact shall be documented in the child's record. [I.C., § 16-2411, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2412. Emergency treatment upon certification by designated examiner.** — A child may be taken into protective custody by a peace officer, or accepted by an ambulance service, and transported and presented to a treatment facility for emergency evaluation and treatment when a designated examiner certifies in writing that he has examined the child within the last seventy-two (72) hours and that on such basis he has probable cause to believe that such child is suffering from serious emotional disturbance as a result of which he is likely to:

- (1) Harm himself or others; or
- (2) Suffer substantial mental or physical deterioration; and
- (3) Require immediate treatment to prevent such harm; and

(4) Less restrictive alternatives have been considered and the detention and treatment proposed is consistent with the least restrictive alternative principle. [I.C., § 16-2412, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2413. Emergency admission and treatment facility determination.** — Upon the presentation of a child to a treatment facility pursuant to section 16-2411, Idaho Code, the facility shall accept the child and shall promptly examine him to determine whether he meets the criteria for emergency evaluation and treatment set forth below.

(1) The child shall be admitted for emergency evaluation and treatment only if a clinician with authority to admit the child determines that there is probable cause to believe that such child is suffering from serious emotional disturbance as a result of which he is likely to:

- (a) Harm himself or others; or
- (b) Suffer substantial mental or physical deterioration; or
- (c) Cause harm to others and immediate treatment is necessary to prevent such harm; and
- (d) Less restrictive alternatives have been considered and the placement and treatment proposed is consistent with the least restrictive alternative principle.

(2) If the examining physician determines that there is not probable cause to believe that the child meets the criteria for emergency evaluation and treatment, the child shall be released to his parents who shall arrange transportation. If the child was presented to the treatment facility by a law enforcement officer and was otherwise subject to detention for a juvenile or criminal offense, he shall remain under the protective custody of the law enforcement officer. The treatment facility shall notify the law enforcement officer and detain the child until law enforcement responds to transport the child to detention.

(3) The treatment facility shall advise any child admitted for emergency evaluation and treatment of the purposes and possible duration of emergency evaluation and of his rights under this chapter as soon after admission as his medical condition permits in the manner prescribed in section 16-2426, Idaho Code. [I.C., § 16-2413, as added by 1997, ch. 404, § 1, p. 1281.]

**16-2414. Order for emergency evaluation.** — Each child who is admitted to a treatment facility under section 16-2413, Idaho Code, shall, within twenty-four (24) hours of being taken into protective custody, be released to his parent or guardian, unless a court order authorizing emergency evaluation has been obtained.

(1) The evidence supporting the claim that an emergency exists with respect to the child shall be submitted to a court of competent jurisdiction.



If the court finds that an emergency situation exists, it shall issue an order for emergency evaluation, which shall authorize the treatment facility to hold the child for up to forty-eight (48) hours at which time he shall be released to his parent or guardian, unless valid consent to voluntary treatment has been obtained under section 16-2407, Idaho Code, or other legal authority is sought to hold the child.

(2) Each child and parent shall also be informed orally and in writing by the evaluation facility of the purposes and the possible consequences of the proceedings, the allegations in the petition, the child's right to communicate with an attorney, and the right to receive necessary and appropriate treatment.

(3) At all stages of the proceeding the court shall consider whether treatment may be voluntarily obtained by the child and his family. If the treatment can be voluntarily obtained, the petition shall be dismissed.

(4) The court may also order that the prosecuting attorney of the county review the appropriateness of the case for filing a petition under the child protective act or the juvenile corrections act.

(5) A child shall not be admitted under this section to a facility operated by the department unless evaluated and authorized by a staff of the regional family and children's services program. [I.C., § 16-2414, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Cross References.** — Child protective act,  
§ 16-1601 et seq.  
Juvenile corrections act, § 20-501.

**Effective Dates.** — Section 2 of S.L. 1997,  
ch. 404 provided that the act should take  
effect on and after July 1, 1998.

**16-2415. Dispositional authority.** — (1) Whenever the involuntary treatment of the child requires payment from public funds, other than medicaid funds, the department, or other funding agency shall have the authority to determine the placement for the child and to make decisions concerning the purchase and provision of mental health services, consistent with the plan of treatment approved by the court.

(2) When the cost of the child's treatment can be paid from private sources or by medicaid, the parent shall have the authority to determine the child's placement and services, consistent with the plan of treatment approved by the court.

(3) All expenditures under the medicaid program shall be governed by the laws and rules applicable to that program.

(4) The department shall issue a disposition order within two (2) days of the order for involuntary treatment. [I.C., § 16-2415, as added by 1997, ch. 404, § 1, p. 1281; am. 2005, ch. 307, § 3, p. 956.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997,  
ch. 404 provided that the act should take  
effect on and after July 1, 1998.

**16-2416. One hundred twenty day involuntary treatment order.**

— (1) Children may be treated involuntarily for a period of up to one hundred twenty (120) days upon a petition filed by the treatment facility or by the parent, guardian, prosecuting attorney or other interested party. The petition shall set forth the facts supporting the allegations and, in the case of petitions filed by a treatment facility, shall describe why the child requires treatment, a detailed description of the symptoms or behaviors of the child that support the allegations in the petition, a list of the names and addresses of any witnesses the petitioner intends to call at the involuntary treatment hearing. The petition shall also contain a statement of the alternatives to court-ordered involuntary treatment that have been considered and the reasons for rejecting the alternatives. The petition shall be filed with the court and copies shall be served upon the person and upon a parent, the next of kin, guardian or custodian and the person's attorney. The copies of the petition shall be accompanied by a notice advising of the child's rights concerning the proceeding.

(2) Upon filing of a petition for involuntary treatment of a child who is not currently under emergency evaluation or voluntary admission, the court shall issue a summons to the child to submit to an examination by two (2) designated examiners. At least one (1) designated examiner shall be a psychiatrist, licensed physician or licensed psychologist. Each designated examiner shall promptly prepare a report on his examination and file it with the court. Copies shall be promptly served upon the child, parent, custodian, guardian and the child's attorney. [I.C., § 16-2416, as added by 1997, ch. 404, § 1, p. 1281; am. 2005, ch. 307, § 4, p. 956.]

**STATUTORY NOTES**

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2417. Hearing on the one hundred twenty day involuntary treatment order.**

— (1) Every child for whom a petition for involuntary treatment has been filed, shall be notified by the court sufficiently in advance to be able to prepare for the hearing and shall receive a prompt hearing. For children confined for emergency psychiatric evaluation or currently under voluntary admission, this hearing shall take place within three (3) business days of the filing of the petition.

(2) The child shall be present at the hearing unless the court finds:

(a) That he has knowingly and voluntarily waived such a right after consulting with counsel, and his counsel shall submit a verified written statement to the court explaining the attorney's understanding of the child's intent; or

(b) That because his behavior at the hearing is so disruptive, it cannot reasonably continue in his presence.

Hearings may be held in the treatment facility whenever the child is an inpatient at the time of the hearing.

(3) Any child who is unable to pay for counsel shall have the right to be provided with counsel at public expense to prepare for and represent him at the hearings.

(4) The prosecuting attorney shall represent the interests of the state at the hearing.

(5) The Idaho rules of evidence and the Idaho rules of civil procedure shall be applied so as to facilitate informal, efficient presentation of all relevant, probative evidence and resolution of issues with due regard to the interests of all parties.

(6) The child shall have the right:

(a) To be represented by counsel;

(b) To present evidence, including testimony of a mental health professional of his own choosing;

(c) To cross-examine witnesses;

(d) To a complete record of the proceedings;

(e) To an expeditious appeal of an adverse ruling.

(7) At the conclusion of the hearing, or within one (1) business day thereafter, the court shall make its findings.

(8) The court shall enter an order discharging the child unless it finds by clear and convincing evidence that the child satisfies all criteria for involuntary treatment in section 16-2418, Idaho Code, in which event it shall enter an involuntary treatment order as provided in section 16-2416, Idaho Code, for evaluation and treatment for a period of no longer than one hundred twenty (120) days.

(9) If at any time during a one hundred twenty (120) day (or any subsequent) period of involuntary treatment, a child is absent without permission, the involuntary treatment order constitutes a continuing authorization and responsibility to the treatment facility and to any law enforcement officer to procure his return. [I.C., § 16-2417, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2418. Criteria for one hundred twenty day involuntary treatment order.** — (1) A child may be treated involuntarily, and placed at a facility, according to the disposition of the department under section 16-2415, Idaho Code, for a period of up to one hundred twenty (120) days if, after the hearing provided in section 16-2417, Idaho Code, the court determines on the basis of clear and convincing evidence that:

(a) The child is suffering from severe emotional disturbance; and

(b) There is reasonable prospect that his illness is treatable by a facility or program operated by the department or other facility available to the department for treatment of children with serious emotional disturbance; and



- (c) A child's parent or guardian refuses or is unable to adequately provide for the treatment of the child consistent with the requirements of public safety; and
- (d) As the result of serious emotional disturbance, the child is:
  - (i) Likely to cause harm to himself or suffer substantial mental or physical deterioration; or
  - (ii) Likely to cause harm to others.
- (2) Within seven (7) days after entry of the order for involuntary commitment, the department of health and welfare shall develop a plan of treatment to be approved by the court which includes:
  - (a) A proposed placement and projections for aftercare upon completion of treatment;
  - (b) Specific behavioral goals by which the success of the treatment can be measured; and
  - (c) Evidence of attempts to involve the patient and the patient's family in the development of the plan.
- (3) The plan of treatment shall be consistent with the least restrictive alternative principle.
- (4) The court may conduct a review hearing at any time to monitor compliance and to make any significant adjustment from the plan of treatment during the period of involuntary commitment. [I.C., § 16-2418, as added by 1997, ch. 404, § 1, p. 1281; am. 2005, ch. 307, § 5, p. 956.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided the act should take effect on and after July 1, 1998.

**16-2419. Effect of involuntary treatment orders on parental rights and custody.** — If an order for involuntary treatment is issued, the parents, guardian or custodian of the child will retain all parental rights, including legal custody of the child, or the orders for involuntary treatment and disposition. The department of health and welfare shall acquire physical custody of the child and the right to determine the disposition and placement of the child whenever the placement requires the expenditure of public funds as provided in section 16-2415, Idaho Code, consistent with the plan of treatment approved by the court. [I.C., § 16-2419, as added by 1997, ch. 404, § 1, p. 1281; am. 2005, ch. 307, § 6, p. 956.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2420. Successive periods of involuntary treatment.** — Any order for involuntary treatment pursuant to section 16-2416, Idaho Code, may be renewed. At the time of expiration of a one hundred twenty (120) day involuntary treatment order, authority for continued involuntary treatment

may be extended for periods of up to one hundred eighty (180) days upon a petition filed with the court by the treatment facility or by the child's parent, or guardian, or other interested party.

(1) The petition shall include a statement why the child still meets the criteria for involuntary treatment, what treatment has been provided and what progress has been made, why a further period of involuntary treatment is warranted, and the identity of any person who has knowledge concerning the case. The petition shall be promptly served upon the child, the child's parent, custodian, or guardian, and the child's attorney.

(2) The child shall be entitled to a hearing before the court on the petition on or before the first business day following expiration of the operative period of involuntary treatment and shall have the same rights to which he was entitled at the initial hearing on involuntary treatment in section 16-2417, Idaho Code.

(3) The court shall order that the child be discharged unless it determines by clear and convincing evidence that:

- (a) The child still satisfies the criteria for involuntary treatment; and
- (b) That there is a reasonable prospect that a substantial therapeutic purpose would be served by a further period of involuntary treatment.

(4) Additional involuntary treatment orders for periods up to one hundred eighty (180) days each may be ordered in accordance with this section. [I.C., § 16-2420, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2421. Waiver of right to be present at hearings.** — A child may waive the right to be present at any hearing to which he is entitled under this section by filing a written waiver that the court finds is knowingly and voluntarily executed by the child. The child's attorney shall consult with him and determine whether the child understands his rights and desires to waive his right to be present at the hearing. The attorney shall then submit a verified written statement to the court explaining the attorney's understanding of the child's intent. By waiving the right to be present at the hearing, the child waives no other rights. [I.C., § 16-2421, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2422. Informed consent to medication or other treatment — Persons under voluntary treatment.** — (1) A facility may not administer any treatments or medications to a child admitted to the facility as a voluntary patient under section 16-2407, Idaho Code, unless the parent,

guardian or custodian of the child has given informed consent to the treatment, except that emergency or medically necessary treatments may be given without informed consent, if delay in treatment may cause harm to the child, and the parent, guardian, or custodian of the child is not available.

(2) After informed consent has been given, the parent, guardian or custodian of a child may revoke such consent at any time, by clearly communicating such revocation to facility staff. When consent has been revoked, the facility shall promptly discontinue the treatment, provided that a course of treatment may be concluded or phased out where necessary to avoid the harmful effects of abrupt withdrawal. The facility may require the parent, guardian, or custodian to sign a written revocation of consent before discontinuing the treatment.

(3) Except in an emergency situation, the parents of a child being treated voluntarily shall have the right to refuse any and all medications or other treatments. If appropriate medications or treatments are refused, and the facility is unable to care for the child without such treatments, the facility may then discharge the child, with due care for his safety. Neither the facility nor providers shall be held liable. If the child appears to meet the criteria for involuntary treatment as specified in section 16-2418, Idaho Code, the facility may file a petition for involuntary treatment. [I.C., § 16-2422, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2423. Informed consent to medication or other treatment — Persons subject to involuntary or emergency treatment.** — (1) During an emergency evaluation under section 16-2413, Idaho Code, or during a period of involuntary treatment ordered under section 16-2418, Idaho Code, the treatment facility may administer necessary medications or other treatments, except for electroconvulsive treatments, to a child, consistent with good medical practice without the informed consent of the parent of the child, if it is not possible to obtain such consent.

(2) Notwithstanding subsection (1) of this section, a treatment facility shall not administer experimental treatment or any other special therapy except as provided by law or in rules promulgated by the department.

(3) No psychosurgery or electroconvulsive treatment shall be performed on a child, except by order of a court upon a finding that the treatment is necessary to prevent serious harm to the child. Consent of the parent of a child to this treatment without a court order shall be invalid and shall not be a defense against any legal action that might be brought against the provider of the treatment.

(4) Consent for other medical/surgical treatments not intended primarily to treat a child's serious emotional disturbance shall be obtained in accordance with the applicable law. [I.C., § 16-2423, as added by 1997, ch. 404, § 1, p. 1281; am. 2005, ch. 307, § 7, p. 956.]



## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2424. Provision of treatment.** — (1) Every child subject to an involuntary treatment order under this chapter shall be provided with appropriate treatment in accordance with the least restrictive alternative principle that offers him a realistic prospect of improvement. Children shall be afforded treatment in facilities that conform to the applicable rules of the department, and that are able to adequately care for and treat the persons they serve.

(2) A written individual treatment plan shall be prepared, with the participation of the child (to the extent he is able), his family and any other persons of his choice, during voluntary admission or emergency psychiatric evaluation or, within seven (7) days of the signing of an order for involuntary treatment. The individual treatment plan shall be approved by the responsible physician, and the course of treatment actually administered shall conform to the plan.

(3) The child's progress in attaining the objectives in the treatment plan shall be noted in his records, and the revisions to the plan shall be made as necessary. The child and the child's parent, custodian, or guardian shall be afforded an opportunity to participate in any substantial revision of the treatment plan.

(4) A copy of the individual treatment plan shall be given to the child, his parents and to any other person designated by him, provided that the responsible physician may preclude disclosure of the individual treatment plan to the child if he states in writing why disclosure would be harmful to the child. [I.C., § 16-2424, as added by 1997, ch. 404, § 1, p. 1281.]

## STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2425. Rights of children in treatment facilities.** — (1) Competence. No right of any child shall be denied or reduced solely by the reason of his having been evaluated, or treated under this chapter. A finding of lack of capacity to make an informed decision under this chapter shall not by itself establish lack of competence for any other purpose.

(2) Right to treatment. Children subject to an involuntary treatment order under this chapter shall have the right to treatment to the extent provided in section 16-2424, Idaho Code.

(3) Healthful and humane environment. Every child shall have the right to a healthful and humane environment. Every facility shall provide a clean, safe and comfortable environment in a structure that complies with applicable licensing requirements governing physical facilities, nutrition, health and safety, and medical services, and for aspects of care for which there are

no mandatory requirements, consistent with the generally accepted professional standards in Idaho. In addition, every child shall have the right to a humane psychological environment that protects him from harm or abuse, provides reasonable privacy, promotes personal dignity, and provides opportunity for improved functioning.

(4) Leaves of absence. Leaves of absence may be granted in appropriate cases at the discretion of the treatment facility. Police officers are authorized to and shall, at the request of a treatment facility, take into protective custody and return to the treatment facility any child who is subject to an order for involuntary treatment and placed by the department and any child placed by the authority of his parents who leaves without proper authorization or does not return at the end of an authorized leave of absence. The child's parent or guardian shall be notified before any leave of absence occurs and in the event that a child is away without authorization, they shall be notified immediately.

(5) Restraints and seclusion. Every child shall have the right to be free from unnecessary or inappropriate restraints or seclusion consistent with the least restrictive alternative principle. Restraints and seclusion shall be administered only in conformity with rules adopted by the department.

(6) Corporal punishment. Every child shall have the right to be free from corporal punishment.

(7) Nutrition. Every child shall have the right to a nutritionally sound and medically appropriate diet.

(8) Exercise and recreation. Every child shall have reasonable opportunities for physical and outdoor exercise and access to recreational equipment. Reasonable limitations may be set by general rules or, for clinical reasons, in particular cases.

(9) Visitors. Every child shall have the right to receive visitors with reasonable privacy as is consistent with the treatment plan.

(a) Hours during which visitors may be received shall be limited only in the interest of effective treatment and efficiency of the facility and shall be sufficiently flexible to accommodate the individual needs of the child and his visitors.

(b) Notwithstanding the above, each resident has the right to receive visits from his physician, psychologist, clergyman or social worker in private, irrespective of visiting hours, provided that the visitor shows reasonable cause for visiting at times other than normal visiting hours.

(c) A facility may impose conditions on visits and privacy of visits if there is reason to believe that a visitor poses a substantial risk of harm to the child, or others.

(10) Communications. (a) Every child shall have the right to send and receive mail. Reasonable rules governing inspection (but not reading) of incoming mail may be established, provided that they are necessary for substantial health care purposes and that they preserve the child's rights of privacy to the extent compatible with his clinical status.

(b) Every child shall have the right to reasonably private access to telephones, including the right to make long-distance calls to the extent he can arrange for payment for such calls.



(c) A treatment facility shall provide reasonable assistance to children in exercising their communication rights. Reasonable limitations on the use of the mail and telephones may be set by general rules. In cases of personal emergencies when other means of communication are not satisfactory, the child shall be afforded reasonable use of long-distance calls. A child who is indigent shall be furnished writing, postage and telephone facilities without charge.

(11) Practice of religion. Every child shall have the right to practice or refrain from practice of a religion. No child shall be subjected to pressure, rewards or punishments based on his decision to practice or refrain from practice of religion or of any particular religion. The treatment facility is not required to provide special assistance to persons so that they may practice a religion.

(12) Personal possessions. Every child shall have the right to keep, use and store personal possessions and to maintain and use bank accounts and other sources of personal funds, unless precluded from doing so by order of the court. Reasonable limitations may be set by general rules or, for clinical reasons, in particular cases.

(13) Nonretaliation. No child shall be subjected to retaliation or to any adverse change of conditions or treatment because of having asserted his rights.

(14) Access to counsel. A child may at any time have a telephone conversation with or be visited by his lawyer or any employee of his attorney's firm, or a representative of the state protection and advocacy system.

(15) Medication. Each child has the right to be free from unnecessary or excessive medication.

(16) Right to education. A child who is in a treatment facility shall be provided education and training as necessary to encourage and stimulate developmental progress and achievement and as required by state and federal law. In no event shall a child be allowed to remain in a treatment facility for more than ten (10) days without receiving educational services. [I.C., § 16-2425, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2426. Notification of rights.** — At the time of admission to a facility, whether the admission is voluntary or involuntary, the facility shall insure that the child is fully informed of his rights in terms that he can understand. This information shall be provided both orally and in writing. Copies of the written explanation of the child's rights and a written, signed acknowledgement by the child and his parent that he has read and understands the rights, shall be kept in the child's records and made available for inspection by representatives of the child and employees of the state protection and advocacy system. A statement of rights shall be posted



in a common area of the facility available to residents and plainly visible. [I.C., § 16-2426, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2427. Discharge.** — (1) The responsible physician shall review periodically whether a child meets the criteria for involuntary treatment, and if he concludes that the person does not meet such criteria, he shall undertake discharge procedures.

(2) Discharge of any child may be delayed for a reasonable period of time in order to arrange transportation or lodging for the child, or for other good cause to protect the safety or well-being of the child.

(3) Involuntary treatment after discharge. A child who has been discharged from emergency evaluation, one hundred twenty (120) day involuntary treatment or a subsequent period of involuntary treatment may be subjected to further involuntary treatment only pursuant to the procedures provided in this chapter and upon a showing of new circumstances warranting such involuntary treatment which were not known at the time of discharge.

(4) Release to outpatient treatment. The responsible physician may, as part of an individual treatment plan for a child who is subject to involuntary treatment, release such child to outpatient treatment upon the condition that, if the child fails to follow through with, or respond acceptably to, such outpatient treatment, he may be returned to inpatient treatment without a court hearing during the effective period of the order, or until he meets the criteria for voluntary treatment or discharge. Within seventy-two (72) hours of his return to the facility, there must be an administrative review to determine if inpatient treatment is necessary. The review hearing must be conducted by the facility director or his designee, a physician, a social worker, psychologist, or nurse. The child and his parent, or guardian shall be given an opportunity to be represented by counsel and to present evidence and testimony.

(5) Habeas corpus. Nothing in this chapter shall limit other legal rights or remedies concerning discharge which a person may have pursuant to law, rule, regulation or policy, including the right to petition for a writ of habeas corpus. [I.C., § 16-2427, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2428. Confidentiality and disclosure of information.** — All certificates, applications, records, and reports directly or indirectly identifying a patient or former patient or an individual whose involuntary

treatment has been sought under this chapter shall be kept confidential and shall not be disclosed by any person except with the consent of the person identified or his legal guardian, if any, or as disclosure may be necessary to carry out any of the provisions of this chapter, or as a court may direct upon its determination that disclosure is necessary and that failure to make such disclosure would be contrary to public interest.

(1) No person in possession of confidential statements made by a child over the age of fourteen (14) years in the course of treatment may disclose such information to the child's parent or others without the written permission of the child, unless such disclosure is necessary to obtain insurance coverage, to carry out the treatment plan or prevent harm to the child or others, or, unless authorized to disclose such information by order of a court.

(2) The child has the right of access to information regarding his treatment and has the right to have copies of information and to submit clarifying or correcting statements and other documentation of reasonable length for inclusion with his treatment record.

(3) Nothing in this section shall prohibit the denial of access to records, by a child when a physician or other mental health professional believes and notes in the child's medical records that the disclosure would be damaging to the child. In any case, the child has the right to petition the court for an order granting access.

(4) Access to records by the state protection and advocacy system shall be governed by 42 U.S.C. 10108 [10801] et seq., as amended. [I.C., § 16-2428, as added by 1997, ch. 404, § 1, p. 1281.]

#### STATUTORY NOTES

**Compiler's Notes.** — The bracketed insertion in subsection (4) was added by the compiler to correct the statutory reference.

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2429. Right to representation.** — (1) Every child has the right to counsel to represent him at all proceedings under this chapter and to obtain the advice of an attorney at any time regarding his status under this chapter, at his or his parents' expense. When a child has not retained an attorney and is unable to do so, or the child and his parents are unable to afford one, and proceedings under this chapter have been initiated in court, the court shall appoint an attorney to represent him in court proceedings.

(2) Every treatment facility shall establish a fair procedure for the assertion, resolution, and redress of grievances, and attempt to resolve problems and protect the rights of people treated by the facility. The child shall have the right to have a representative present at these proceedings, but not at public expense. [I.C., § 16-2429, as added by 1997, ch. 404, § 1, p. 1281.]

## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2430. Transportation.** — Following disposition by the department, it is the responsibility of the county sheriff to transport the person to the treatment facility. The department must notify the sheriff of the designated treatment facility within twenty-four (24) hours of the entry of the department's disposition order. The county and the department shall allow for transportation by a family member or a member of the family and children's services regional program staff whenever possible and determined to be in the best interests of the child. [I.C., § 16-2430, as added by 1997, ch. 404, § 1, p. 1281.]

## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2431. Cost of involuntary treatment proceedings.** — All costs associated with the involuntary treatment proceedings, including usual and customary fees of designated examiners, transportation costs and all medical, psychiatric and hospital costs, shall be the responsibility of the parents of the child according to their ability to pay, based on the sliding fee scale established under section 16-2433, Idaho Code, or, if indigent, the county of such child's residence after all personal, family and third party resources including medical assistance as authorized by title XIX of the social security act, as amended, are considered. The department shall assume responsibility for usual and customary treatment costs when the order for involuntary treatment is signed until the involuntary person is discharged and after all personal, family and third party resources are considered in accordance with section 66-354, Idaho Code. For the purposes of this section, "usual and customary treatment costs" includes room and board; support services rendered at a facility of the department; routine physical, medical, psychological and psychiatric examination and testing; and group and individual therapy, psychiatric treatment, medication and medical care which can be provided at a facility of the department or approved by the department. The term "usual and customary treatment costs" shall not include witness fees and expenses for court appearances. Counties shall have no responsibility for costs of voluntary treatment of children under this chapter. Counties shall have no responsibility to pay for the cost of involuntary treatment of children after the court order is signed. This section does not affect the right of any child to receive free mental health or developmental disability services under any publicly supported program or the right of any parent to reimbursement from, or payment on the child's behalf by, any publicly supported program or private insurer. [I.C., § 16-2431, as added by 1997, ch. 404, § 1, p. 1281.]



## STATUTORY NOTES

**Federal References.** — Title XIX of the Social Security Act is compiled as 42 U.S.C., § 1396 et seq.

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2432. False statements — Penalties.** — (1) Any person who knowingly and willfully gives false information or takes other wrongful action for the purpose of distorting, corrupting or interfering with the process provided in this chapter shall be subject to a civil fine, and shall be liable for injunctive relief and money damages, in addition to any other liability under law.

(2) Nothing in this chapter shall be construed as diminishing or relieving any person from their duty to report instances of child neglect or abuse under chapter 16, title 16, Idaho Code, or any liability associated with failure to make such reports. [I.C., § 16-2432, as added by 1997, ch. 404, § 1, p. 1281.]

## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2433. Department rules.** — The director is authorized to promulgate rules necessary to implement this chapter that are consistent with its provisions including the development of a schedule of fees to be charged to parents by the department for services, based on the cost of services and the ability of parents to pay. [I.C., § 16-2433, as added by 1997, ch. 404, § 1, p. 1281.]

## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.

**16-2434. Construction.** — (1) As used in this chapter, pronouns refer to both male and female persons equally, and articles refer to singular and plural persons and things.

(2) If any provision of this chapter or its application to any person or circumstance is held invalid, it is the legislative intent that such invalidity not affect other provisions or applications which can be given effect apart from that which is invalidated, and to this end the provisions of this chapter shall be deemed severable.

(3) This chapter is intended as a unified, general chapter covering its subject matter, and accordingly none of its provisions shall be deemed to be repealed by implication by subsequent legislation if such a construction can reasonably be avoided. [I.C., § 16-2434, as added by 1997, ch. 404, § 1, p. 1281.]

STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 404 provided that the act should take effect on and after July 1, 1998.





## TITLE 17

### APPEALS

#### CHAPTER.

1. APPEALS FROM PROBATE AND JUSTICES' COURTS  
TO DISTRICT COURTS. [REPEALED.]

#### CHAPTER.

2. APPEALS IN PROBATE MATTERS, §§ 17-201 —  
17-206.

### CHAPTER 1

#### APPEALS FROM PROBATE AND JUSTICES' COURTS TO DISTRICT COURTS

#### SECTION.

17-101 — 17-107. [Repealed.]

### 17-101 — 17-107. Appeals to district courts — Procedures. [Repealed.]

#### STATUTORY NOTES

**Compiler's Notes.** — This chapter, which comprised C.C.P. 1881, §§ 665-671; R.S., & C.L., §§ 4838-4844; C.S., §§ 7179-7185; I.C.A., §§ 11-301 — 11-307, was repealed by S.L. 1971, ch. 268, § 1. For present law, see I.R.C.P. 83(a)-83(y).

Sections 17-102 — 17-107 were made rules

of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

### CHAPTER 2

#### APPEALS IN PROBATE MATTERS

#### SECTION.

17-201. Appealable judgments and orders.  
17-202. [Repealed.]

#### SECTION.

17-203. Effect of reversal.  
17-204 — 17-206. [Repealed.]

**17-201. Appealable judgments and orders.** — An appeal may be taken to the district court of the county from a judgment, or order of the magistrates division of the district court in probate matters:

1. Granting, refusing or revoking, or refusing to revoke, letters testamentary, or of administration, or of guardianship.

2. Admitting, or refusing to admit, a will to probate.

3. Against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof.

4. Against or in favor of setting apart property, or making an allowance for a widow or child.

5. Against or in favor of directing the partition, lease, mortgage, sale or conveyance of real property.

6. Settling an account of an executor, administrator or guardian.

7. Refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy or distributive share.

8. Confirming report of appraiser setting apart the homestead. [C.C.P. 1881, § 662; R.S., R.C., & C.L., § 4831; C.S., § 7173; am. 1927, ch. 68, § 1, p. 84; I.C.A., § 11-401; am. 1935, ch. 71, § 1, p. 125; am. 1971, ch. 269, § 1, p. 1074.]

## JUDICIAL DECISIONS

### ANALYSIS

Appealable orders.

Collateral attack.

Failure to take appeal — effect.

Nature of right of appeal.

Nonappealable orders and judgments.

Scope of review.

Timeliness of appeal.

### Appealable Orders.

Entry made by judge in his docket, "damages, \$310.00," is not a judgment from which an appeal will lie to the district court. *Grey v. Cederholm*, 2 Idaho (Hasb.) 34, 3 P. 12 (1884).

An order denying the issuance of an order to show cause why real estate of decedent should be sold to pay debts is appealable. *State ex rel. Missoula Mercantile Co. v. Whelan*, 6 Idaho 78, 53 P. 2 (1898).

An order of the court refusing to admit a will to probate is appealable. *In re Paige's Estate*, 12 Idaho 410, 86 P. 273 (1906).

Parent or guardian is not bound by order adjudging a child delinquent and sending him to industrial training school unless such parent or guardian appeared or was brought into the proceeding. If he was a party he has a right of appeal under this section. *In re Sharp*, 15 Idaho 120, 96 P. 563 (1908).

A hearing on the return to an order of sale and the objections made thereon followed by a judgment may be appealed to the district court. *In re Christensen's Estate*, 15 Idaho 692, 99 P. 829 (1909).

Order which in effect amounts to a disallowance of the respondent's claims against an estate is an appealable order. *Miller v. Lewiston Nat'l Bank*, 18 Idaho 124, 108 P. 901 (1910).

Final decree of distribution is not indivisible, and a part thereof may be appealed from. *In re Blackinton's Estate*, 29 Idaho 310, 158 P. 492 (1916).

Order of court committing infant on delinquency charges is appealable by his parents. *In re Farnsworth*, 46 Idaho 47, 266 P. 421 (1928).

Where court decrees specific performance of a contract, one objecting to the petition has no remedy except by appeal and his right to appeal was granted by former section. *Wilson*

*v. Fackrell*, 54 Idaho 515, 34 P.2d 409 (1934).

Order settling guardian's account is final and appealable and may be reviewed by the Supreme Court. *Short v. Thompson*, 56 Idaho 361, 55 P.2d 163 (1936).

Party claiming an interest in the estate of a decedent may not present his claim and establish his status in the first instance on appeal to the district court from a decree distributing estate. *Shaw v. McDougall*, 56 Idaho 697, 58 P.2d 463 (1936).

Any error in the decree approving the administrator's final account and distributing the estate is subject to correction, both by timely motion and by appeal. *Horn v. Cornwall*, 65 Idaho 115, 139 P.2d 757 (1943).

The order of commitment of an 11-year-old girl to an aid society, taking her from the custody of her parents was an appealable, final judgment. *State v. Bombino*, 84 Idaho 554, 374 P.2d 854 (1962).

Order of intestacy and appointment of administrator entered by district court was an appealable order under this section since it must be considered the same as if it had come up from the magistrates' division. *In re Estate of Pierce*, 95 Idaho 625, 515 P.2d 1017 (1973).

Until the magistrate approves the administration, distribution and closing of the estate, the approval of accountings by the magistrate is not ripe for review; however, there is no impediment to special review of interlocutory orders approving interim accountings by certification under I.R.C.P. 54(b), concerning the appeal from the magistrate division to the district court, and under I.R.C.P. 54(b) or I.A.R. 12 concerning the appeal from the district court to the supreme court. *Spencer v. Idaho First Nat'l Bank*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

A judgment or an order approving an interim accounting of an estate is not appeal-

able unless certified. *Spencer v. Idaho First Nat'l Bank*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

A determination that someone is an omitted spouse under § 15-2-301 is a determination "against the validity of the will" as to the omitted spouse pursuant to subdivision 3 of this section for the purpose of appeal; the will remains partially valid and subdivision 3 of this section should not be read to mean court's order must be against or in favor of the validity of the whole will before an appeal can be taken under this section; since the rights of the spouse are substantially altered upon the determination that he is an omitted spouse, the will is necessarily and substantially invalidated. *Keeven v. Wakley*, 110 Idaho 452, 716 P.2d 1224 (1986).

An order of intestacy and appointment of an administrator is appealable under subdivision 1. of this section even though not a final judgment. *Keeven v. Wakley*, 110 Idaho 452, 716 P.2d 1224 (1986).

#### **Collateral Attack.**

Where an administrator's payments of interest on mortgage indebtedness were approved by the court and the administrator's account, including the final account, acknowledged liability on the note and mortgage, the order settling the final account and distributing the realty involved subject to the lien of the mortgage was conclusive on the validity of the mortgage, and could not be collaterally attacked. *Horn v. Cornwall*, 65 Idaho 115, 139 P.2d 757 (1943).

#### **Failure to Take Appeal — Effect.**

Where no appeal was taken from either the order of October 26, 1954, providing for the family allowance or an order of May 26, 1952, these being appealable orders and no appeal having been taken therefrom, they became final. *Lundy v. Lundy*, 79 Idaho 185, 312 P.2d 1028 (1957).

#### **Nature of Right of Appeal.**

Right of appeal in probate matters is purely statutory and can be taken only from judgments, orders, decrees, and proceedings enumerated in the statute. In re *Coryell's Estate*, 16 Idaho 201, 101 P. 723 (1909).

By enactment of this section, the legislature intended that certain actions taken by the courts handling the settlement of decedent's estates were of such material consequence that it was essential that the decisions reached by the courts in those areas should be subject to review by a higher court regardless of whether such decisions were final judgments. In re *Estate of Pierce*, 95 Idaho 625, 515 P.2d 1017 (1973).

#### **Nonappealable Orders and Judgments.**

Where a claim against an estate is allowed and then set aside, an appeal will not lie from

the order setting aside the former allowance as such claim is then pending against the estate. In re *Coryell's Estate*, 16 Idaho 201, 101 P. 723 (1909).

There is no provision for an appeal from an order made subsequent to closing of estate. *Chandler v. Probate Court*, 26 Idaho 173, 141 P. 635 (1914).

An order declaring the nature of property in probate proceedings is not appealable, and an appeal is properly taken from the decree of distribution of the court. In re *Skinner's Estate*, 48 Idaho 288, 282 P. 90 (1929).

No appeal lies from an order refusing to revoke the probate of a will. *Porter v. Porter*, 54 Idaho 99, 28 P.2d 898 (1934).

An appeal to district court from an order denying a motion for a change of venue, or to correct the record or to strike out, is not such an appeal as is authorized by statute. *Vaught v. Struble*, 63 Idaho 352, 120 P.2d 259 (1941).

An order refusing the appellant's petition for distribution taking it under consideration and finding and ordering that the estate was not ready in that there were unpaid bills was not a final order which was appealable. *Lundy v. Lundy*, 79 Idaho 185, 312 P.2d 1028 (1957).

Where the district court initially heard the objection by children of intestate to the classification of a motel as community property in the administratrix's proposed final accounting, the district court's order declaring the motel to be community property was not an appealable order. In re *Estate of Freeburn*, 97 Idaho 845, 555 P.2d 385 (1976).

#### **Scope of Review.**

Appeal from an order directing a conveyance of property will not authorize a review of the action of the court in directing a sale, since appeals are specifically authorized from each of said orders. *Reed v. Stewart*, 12 Idaho 699, 87 P. 1002 (1906).

Where objections are raised to an accounting and report in the administration of a decedent's estate and a contested hearing is held concerning those objections, the court must, under I.R.C.P. 52(a), make findings of fact and enter conclusions of law in respect to the objections and the account. *Spencer v. Idaho First Nat'l Bank*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

#### **Timeliness of Appeal.**

No appeal having been taken or motion made within the specified time limits, the decree of distribution became a judgment, final and conclusive upon the parties to the probate court proceeding, as to all provisions thereof not changed by the amended decree, which did not affect appellant's interest; therefore, her appeal was untimely. *Frasier v. Frasier*, 87 Idaho 510, 394 P.2d 294 (1964).

**Cited in:** In re *Christensen's Estate*, 15



Idaho 692, 99 P. 829 (1909); *Connolly v. Probate Court*, 25 Idaho 35, 136 P. 205 (1913); *Mason v. Pelkes*, 57 Idaho 10, 59 P.2d 1087 (1936); *Woodland v. Spillman*, 75 Idaho 286, 271 P.2d 819 (1954); *Yribar v. Fitzpatrick*, 91 Idaho 105, 416 P.2d 164 (1966); *Knudson v.*

*Bank of Idaho*, 91 Idaho 923, 435 P.2d 348 (1967); *State, Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979); *Kunzler v. Kunzler*, 109 Idaho 350, 707 P.2d 461 (Ct. App. 1985).

## 17-202. Undertaking not required of executor. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — This section, concerning executor's undertakings, which comprised C.C.P. 1881, § 663; R.S., R.C., & C.L., § 4832; C.S., § 7174; I.C.A., § 11-402, was repealed by S.L. 1975, ch. 242, § 1. For present law, see I.R.C.P. 83(i), I.A.R. 16.

This section had previously been made a

rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

**17-203. Effect of reversal.** — When the order or decree appointing an executor, administrator or guardian is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor, administrator or guardian, if he have [has] qualified, are as valid as if such order or decree had been affirmed. [C.C.P. 1881, § 664; R.S., R.C., & C.L., § 4833; C.S., § 7175; I.C.A., § 11-403.]

### STATUTORY NOTES

**Compiler's Notes.** — The bracketed word "has" was inserted by the compiler for clarity.

This section was made a rule of procedure and practice for the courts of Idaho by order of

the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

## 17-204. Manner of taking appeal. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — This section, regarding the manner of taking appeals, which comprised 1903, p. 372, § 1; reen. R.C. & C.L., § 4834; C.S., § 7176; I.C.A., § 11-404; am. 1971, ch. 269, § 2, p. 1074, was repealed by S.L. 1975, ch. 242, § 1. For present rule see Idaho Rules of Civil Procedure, Rule 83(a) — 83(y).

This section had previously been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

## 17-205. Undertaking. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — This section, concerning undertakings on appeal, which comprised 1903, p. 372, § 2; reen. R.C. & C.L., § 4835; C.S., § 7177; I.C.A., § 11-405, was repealed by S.L. 1975, ch. 242, § 1. For

present law, see I.R.C.P. 83(i), I.A.R. 16.

This section had previously been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was re-

scinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

**17-206. Hearing on appeal. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, concerning hearing on appeal, which comprised S.L. 1903, § 3, p. 372; reen. R.C. & C.L., § 4836; C.S., § 7178; I.C.A., § 11-406, was repealed by S.L. 1971, ch. 269, § 3. For present law, see I.R.C.P. 83(a) — 83(y).

This section had previously been made a

rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.





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